POLICE ACADEMY
715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On December 18, 2002, 53-year-old RCMP Superintendent Dennis Massey was on duty and driving from a Calgary City police station to the RCMP office at Springbank when a flat deck trailer loaded with a large propane tank broke away from an eastbound truck, crossed the centre line, and crushed his vehicle. Superintendent Massey was cut from the wreckage and transported to hospital where he succumbed to his injuries. Superintendent Massey was a 33 year member with the force and is survived by his wife, mother, a brother, and a sister.

The above information was provided with the permission of the Officer Down Memorial Page: available at www.odmp.org/canada

CUMULATIVE FACTORS PROVIDE REASONABLE GROUNDS

R. v. Reid, (2002) Docket:C38518 (OntCA)

The police had the accused (a suspended driver) under surveillance and saw him driving a vehicle bearing stolen licence plates. One evening, he and a companion were observed unload musical equipment stolen from a recent break and enter of a musical studio. They were moving it from his companion's vehicle into the lobby and elevator of an apartment where the accused lived. The accused was arrested while carrying a stolen stereo to the elevator. He was also holding a bag of burglary tools and had a rubber glove in his pocket.

At his trial, the accused offered an explanation for the possession of the stolen goods. Although he admitted he drove while suspended, that the licence plates on his car were not his, and that he knew the property was stolen, he claimed he was simply helping his companion unload the musical equipment for storage at his apartment. He claimed he did not know the bag contained burglary tools and that he picked up the rubber glove and put it in his pocket after it fell from his companion's car while unloading the equipment. The trial judge rejected his explanation and he was convicted of break and enter, possession of stolen property, and possession of burglary tools. He appealed to the Ontario Court of Appeal arguing, among other grounds, that the police did not have reasonable grounds to arrest him and that the trial judge misapplied the doctrine of recent possession.

Reasonable Grounds

The Ontario Court of Appeal found the arrest lawful. The cumulative factors of being suspended, driving a vehicle bearing stolen licence plates, and unloading computers and musical equipment late at night into the lobby and elevator of his apartment building shortly after the break and enter and theft of a music studio provided ample reasonable grounds to justify the accused's arrest.

Doctrine of Recent Possession

The doctrine of recent possession allows the court to find that the possessor of recently stolen goods, in the absence of a reasonable explanation, stole the goods. Because the accused was found in possession of stolen musical

Volume 3 Issue 1
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equipment, the trial judge drew the inference that he committed the break and enter of the music studio. However, the accused suggested that since there was no evidence directly linking him to the break and enter and because he provided an explanation for his actions the night of his arrest, no inference of guilt for the break and enter could be drawn. In ruling against the accused, the Ontario Court of Appeal held that an "unreasonable explanation", such as that provided to and rejected by the trial judge in this case, was no explanation at all for the purpose of rebutting the inference drawn by the court. Thus the unexplained possession of stolen goods by the accused less than two hours after the break and enter permitted the inference that he stole them. His appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CONFESSIONS RULE: POLICE MUST ACCOUNT FOR TIME IN CUSTODY

R. v. Holmes,
(2002) Docket:C35772 & C34957 (OntCA)

The accused was arrested for arson while walking at the side of the road after two residential garages were set on fire. He was informed of the reason for his arrest and advised of his right to counsel. Upon arrest, he denied being responsible for the crimes. At the police station, the accused made several unsuccessful attempts to contact his lawyer. Sixteen hours later he was re-informed of his right to counsel and spoke to his lawyer. He was then interviewed for more than five hours. Although he denied setting them, he made several statements that placed him in the area of the fires and provided a motive. The accused was convicted by a judge and jury, but appealed to the Ontario Court of Appeal arguing, among other grounds, that his statement was inadmissible because the Crown failed to prove it was voluntary beyond a reasonable doubt. He suggested that the police unsuccessfully accounted for the 16-hour gap from the time of his arrest to the time his statement was taken. The Crown claimed that the statements were voluntary because the accused was advised of his right to counsel and spoke with his lawyer.

Voluntariness

The common law confessions rule requires the Crown prove that a statement made to a person in authority is voluntary beyond a reasonable doubt. This burden not only demands the Crown prove the atmosphere under which the statement itself was taken was free from inducements and oppression, but the surrounding circumstances leading up to it were also free from these factors. Although the accused was able to consult with a lawyer, which is an important circumstance to consider in determining the voluntariness of a statement, this does not necessarily render any statement made voluntary. The right to counsel and the confessions rule are complimentary, but not the same. The obligation was on the Crown to account for the lengthy period that the accused was held in custody. Since the Crown failed to affirmatively explain the 16 hours of custody, relying on the fact the accused spoke to a lawyer, by itself, was insufficient to prove voluntariness. The Ontario Court of Appeal concluded that trial judge erred in his assessment of voluntariness.

24 Hour Detention

Section 503(1) of the *Criminal Code* requires the police to bring an arrested person before a justice of the peace without unreasonable delay and in any event within 24 hours. The Ontario Court of Appeal noted this section does not provide the power to simply detain a person for a period of 24 hours to investigate. The police must justify why an accused was not taken before a justice without unreasonable delay by offering an explanation, which was not provided in this case. As a result, the convictions were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

'OFF SHIFT' POLICE OFFICER ACTING IN COURSE OF DUTIES

R. v. Jones, 2002 BCPC 0423

An "off duty" police officer dressed in civilian clothes identified himself as a police officer to the accused, who was a participant in a fight. The officer told the accused to sit on the curb, but the accused resisted the officer and attempted to run away. He also struggled while responding police attempted to handcuff him. At issue was whether the "off duty" police officer was in the lawful execution of his duty for the offence of obstructing a peace officer under s.129 of the *Criminal Code*. In concluding that the "off-duty" member was acting as a police officer, British Columbia Provincial Court Judge Angelomatis stated:

> I will find that the police officer is on duty, and the reason I am finding it is that I think it is inappropriate for a police officer to himself say that he believes himself to be on duty. It is a matter of law, not what he thinks. The law, both by looking at the definition of the Code and under the Police Act, the provincial Code does not specify a timeframe, and it logically seems consistent that one would not be a police officer simply as a result of a booking of a shift or some union constraint on time; that if you are acting in the course and scope of what should be your duties, or are your duties, then you acquire the definition of a police officer and are entitled to the protection of being a police officer.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"*Laws are partly formed for the sake of good men, in order to instruct them how they may live on friendly terms with one another, and partly for the sake of those who refuse to be instructed, whose spirit cannot be subdued, or softened, or hindered from plunging into evil*" Plato (427-347 BC)

CLASS 88 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 88 as qualified municipal constables on November 15, 2002.

ABBOTSFORD
Cst. Chris Nightingale
Cst. Donald Ridder

CENTRAL SAANICH
Cst. Kevin Nystedt

DELTA
Cst. Trent McKie

WEST VANCOUVER
Cst. Katrina Bull
Cst. Robin MacDonald
Cst. Tom Wolff von Gudengberg

STL'ATL'IMX
Cst. Leonard Isaac

VANCOUVER
Cst. Dino Antonel
Cst. Joanne Arabski
Cst. Todd Blower
Cst. Kaleen Bowyer
Cst. David Brander
Cst. Silvana Burtini
Cst. Chris Cronmiller
Cst. Alison Cropo
Cst. Tyler Doolittle
Cst. Kenneth Duckworth
Cst. Alison Gailus
Cst. Christian Galbraith
Cst. Jason Gibbons
Cst. Jennifer Obuck
Cst. Lee Patterson
Cst. Luis Ramirez
Cst Jennifer Tang
Cst. Duane van Beek
Cst. Tim Ward
Cst. Melissa Yamamoto

Congratulations to Cst. Donald Ridder (Abbotsford), who was the recipient of the British Columbia Association of Chiefs of Police Shield of Merit for best all around recruit performance in basic training. Cst. Silvana Burtini (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Duane van Beek (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Lee Patterson (Vancouver) received the British Columbia Federation of Police Officers Valedictorian award for being selected by his peers to represent his class at the graduation ceremony. Cst. Patterson also received a Class Supervisor's award as a special honour for his leadership and dedication to

his class. Cst. Christian Galbraith (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training (50/50). Chief Constable Jamie Graham of the Vancouver Police Department was the keynote speaker at the ceremony.

LEADERSHIP & MANAGEMENT: CONFLICTING or COMPLIMENTARY CONCEPTS?

Sgt. Mike Novakowski

Webster's New World Dictionary[1] defines the word 'manage' as "to control… behaviour" while 'lead' is defined as "to guide by influence". Like the dictionary definition, many of today's authors of leadership and management literature attempt to differentiate between these two models. Catchy phrases and trendy parlance are used to illustrate a dichotomy. For example, Covey[2] proposes that managers do things right whereas leaders do the right thing. Loeb and Kindel[3] advocate that management is about execution and leadership about vision. Yukl[4] however, suggests using caution when attempting to appropriately define these terms simply by delineating their differences.

In addition to leadership, expert Warren Bennis[5] suggests that today's organizational leaders must also possess administrative, or management, skills. Bennis describes western organizational life as logical, analytical, linear, controlled, and conservative (or a left brained culture). People who work in research and development positions, by sharp contrast, are intuitive, conceptual, and artistic (or right brained). Leaders, Bennis believes, must be whole brained; administrative and imaginative. Unfortunately, as Bennis points out, corporate culture usually only rewards left brain accomplishments (tradition) while right brain achievements (innovation) are discredited. Leadership, or the whole brained approach, requires trust, including one's hunches and impulses, which usually translate into doing the right thing.

In policing, people require both leadership and management skills at all levels. Assuming that every officer can be a leader, it is important for the officer to possess the abilities necessary to 'do the right thing in the right way'. For example, officers must be able to use innovative methods for solving problems and combating crime, yet at the same time possess strong investigative file management skills. However, the culture of a police organization often stifles officers from taking risks and demonstrating leadership capacities.

Conforming closely to departmental policy, procedure, rules, or tradition often restricts an officer's ability to do the right thing. This technical or mechanical aspect of decision-making attempts to control officer conduct. Leadership decision making by distinction, uses vision, values, and ethical considerations to guide judgment. Police organizations must be prepared to empower their followers by removing structural barriers such as excessive policy and procedure[6]. Police organizations must move forward from the traditional hierarchical management style of controlling behaviour through excessive regulation to guiding officers by influencing their values and underlying assumptions. Management can compliment leadership, but only to the extent where doing the right thing is compatible with doing things right!!!

[1] Webster's New World Dictionary (1995). New York, N.Y.: Simon & Schuster Inc.
[2] Covey, Stephen. (1989). *The Seven Habits of Highly Effective People*. New York, N.Y.: Simon & Schuster Inc.
[3] Loeb, Marshall & Kindel, Stephen. (1999). *Leadership for Dummies*. Harper Collins Publishers Inc.
[4] Yukl, Gary. (2002). *Leadership in Organizations*. Upper Saddle River, N.J.: Prentice-Hall Inc.
[5] Bennis, Warren. (1991). *On Becoming a Leader*. Nightingale-Conant Corp.
[6] Kotter, John P. (1996). *Leading Change*. Boston, Mass.: Harvard Business School Press.; Yukl, Gary. (2002). *Leadership in Organizations*. Upper Saddle River, N.J.: Prentice-Hall Inc.

SEARCH OF TRUNK INCIDENTAL TO ARREST

R. v. Trenton, 2002 SKPC 69

A police officer stopped the accused driving and arrested him for an outstanding warrant under Saskatchewan's provincial *Alcohol and Gaming Regulations Act*. He was read his *Charter* rights and the police caution. While being handcuffed, the officer detected a faint to moderate fresh odour of marihuana on the accused. He was searched and the officer found a pager with $80, a glass tube containing old marihuana roach ends, and $220 in a rear pocket. The officer called a canine unit trained in the detection of drugs and .5 grams of marihuana was found in the trunk of the vehicle. The accused was arrested for possession of marihuana under s.4(1) of the *Controlled Drugs and Substances Act* and was re-read his rights and the police warning.

At trial, the accused argued the police did not have exigent circumstances at the time of the search and therefore required a search warrant. Furthermore, the arrest was pursuant to a warrant for a liquor ticket and therefore a search beyond his person was not properly incidental to arrest because it was not conducted to secure evidence of the offence for which he was originally arrested (liquor warrant). As a result, he suggested the warrantless vehicle search was unreasonable and the marihuana should be excluded. The Crown, on the other hand, contended that the search of the accused and his vehicle was lawful as an incident to arrest. The police were acting on the belief that they had found evidence of marihuana during the search of his person and therefore were entitled to search his vehicle.

The Search

Since the police did not have a warrant, the Crown carried the burden of demonstrating that the search was nonetheless reasonable. Saskatchewan Provincial Court Justice Whelan concluded the arresting officer was entitled to arrest the accused for possession of marihuana after the personal search, but before the vehicle search. However, even though he did not advise him he was under arrest at the time, the search of the vehicle that followed was still incidental to the arrest. A search incidental to arrest can precede the arrest provided the officer is entitled to make the arrest prior to the search. In this case, the accused was arrested on the warrant which permitted the officer to search his person incidental to that arrest. After discovering the items on his person, the officer could have arrested the accused for the possession offence and was therefore allowed to search the vehicle because he was "suspicious that further evidence of crime might be found in the vehicle". The search was properly conducted as an incident to arrest, was thus reasonable, and the evidence was admissible.

Complete case available at www.canlii.org

SEARCH FIRST, ASK QUESTIONS LATER?

R. v. Flett 2002 MBPC 10034

Two uniformed police officers on patrol after midnight in a high crime area observed four men on the sidewalk, one of which appeared to have a can of pepper spray in his hand. The male saw the police car and threw the can to the ground. As the officers stopped, two of the men fled on foot. The officers approached the two remaining men and advised them they were being detained "to ascertain the ownership of the spray". Both men were wearing red, which the police believed to be an insignia of the aboriginal inner city street gang known as the "Indian Posse". The canister of spray was 10-15 feet from the males. One officer, a 5 year member, dealt with the male she saw throw down the spray. He acknowledged ownership of it and was arrested, searched, and

placed in the police car. The second officer, a 5 month junior member attended to the accused. He was wearing a red bandana tucked in, but visibly hanging out of his belt. On request for identification, the accused produced three pieces of government ID. After this interaction, the officer searched the accused for "safety reasons" based on "departmental policy" and found a knife when he reached inside the accused's winter jacket and searched his interior chest pocket. The accused was charged with carrying a concealed weapon.

During a *voire dire* to determine the admissibility of evidence, the accused argued that he had been arbitrarily detained contrary to s.9 of the *Charter* and that the search of his person violated his right to be secure against unreasonable search or seizure protected under s.8. As a result, he contended the knife was inadmissible as evidence. The Crown suggested that the officer had articulable cause justifying the detention and the search was proper incidental to that detention for officer safety.

The Detention

In finding the detention lawful, Justice Devine of the Manitoba Provincial Court stated:

> In my view, there can be no issue that these officers did have articulable cause to briefly detain these two individuals in order to investigate the offence that they believed they had seen being committed, that of being in possession of a prohibited weapon. Even though I have found that the police officers did know which of the two individuals had been in possession of the canister prior to its being thrown down, I also find that they were entitled to briefly detain [the accused] in these circumstances in order to ascertain his identify. He readily complied with this request, producing three different pieces of identification.
>
> No issue can be taken with the police conduct to this point. They believed they had observed an offence. Their subsequent investigation in picking up the discarded item and questioning the suspect about ownership was brief. [The accused's companion's] admission of ownership gave them the reasonable and probable grounds they needed to arrest him for the offence. In all of the circumstances, it was also reasonable for the police to briefly detain [the accused] in order to ascertain his identity. They may have needed to speak to him further regarding the incident if, for example, [the accused's companion] had later tried to point the finger at [the accused]. The police may then have needed to follow up with [the accused] to eliminate this possibility. In the result, defence has not persuaded me that the brief detention of [the accused] on the street for a period sufficient to ascertain his identity was arbitrary or a breach of the Charter.

The Search

Although the detention was justified, the accused was not a suspect in the offence the police observed. He was cooperative, complied with the officer's request for identification, did not run away, was neither drunk, nor aggressive, nor threatening. The search was conducted <u>after</u> the conversation and production of identification and went beyond a pat-down search to involve a search of inner jacket pockets. In concluding that the search was unreasonable, Justice Devine held:

> Given the timing of the search in the context of the events, I find that in the totality of circumstances this search was not for the purposes of officer safety but was rather an investigatory exploration that extended the period of detention beyond that justified by the events. The police did not call for back-up, did not opt to pursue the fleeing persons and got out of the car with full knowledge of who the perpetrator was. As indicated above, I do accept that they were entitled to ask [the accused] for identification in the event they needed to talk to him at a later time about the incident, but they were not entitled to detain [the accused] for longer than the period it took him to produce identification. <u>The fact that they chose to search him after they had satisfied the legitimate purposes of the detention undermines the credibility of their articulated concern</u>. They of course also had the option at any point of telling [the accused] to leave, rather than searching him. (emphasis added)
>
> ……

> This issue of possible gang membership may have been a factor tending towards legitimizing the search had not the timing of the search belied the assertion as to why it was done. Equally however, one must be cautious that the understandable abhorrence that police and many members of society feel for the activities carried out in the names of such gangs does not become an excuse for singling them out for discriminatory treatment. It is somewhat ironic that [the accused], who unlike two of his companions stayed around to speak to the police, was rewarded for his cooperation by being detained and searched. Meanwhile the two whose flight could arguably have suggested that they had something more to hide were not pursued by police. This hardly promotes the message that there is anything to be gained by cooperating with the police.

And further:

> …I do not believe that we have yet reached the stage where the incantation of "officer safety" can be used to legitimize every fishing expedition undertaken by the police under that mantra.
>
> In so saying, I do not mean in the least to trivialize the danger faced by the police officers patrolling our streets nor to undermine their legitimate right to take all reasonable and lawful steps to ensure their own safety in a given situation. However the courts must be equally vigilant in not giving the police carte blanche to initiate an "investigatory" conversation with unsavory individuals as a guise for carrying out a personal search that they would not otherwise be able to make. Proportionality and individual circumstances must be examined in each instance of reliance on this doctrine.

Complete case available at www.canlii.org

Note-able Quote

"*[O]f all the criminal justice components, it's our police who are respected the most*[7]" Member of Parliament Jacques Saada, Parliamentary Secretary to the Solicitor General of Canada.

[7] From Speaking notes during the International Centre for the Prevention of Crime November 10, 1998, available online at www.csc-scc.gc.ca

CORRECTIONAL OFFICERS HAVE DUTY TO PROTECT INMATE

Guitare v. Canada, 2002 FCT 1170

The plaintiff, a federally incarcerated and segregated inmate at Millhaven Institution, sued the government for his injuries arising from an assault occurring in his cell. He alleged that correctional officers were negligent in failing to keep him safe and promptly coming to his rescue. The plaintiff, who was labeled a sexual predator, had been placed in the segregation unit for his own safety. To maintain safety amongst the prisoners in this unit, only one inmate is allowed on the range while all others remain secured in their cells. On this occasion the range cleaner (an inmate who serves meals, does laundry, and cleans up) was standing across from the plaintiff's cell speaking to another inmate. The plaintiff overheard the cleaner use the term "hound" (a reference to a sex offender) and engaged in a heated argument with him involving swearing and insults. Because the plaintiff felt immune from physical attack in the safety of his secure cell, he goaded on the inmate cleaner. The cleaner threatened to have the plaintiff's door opened and kill him.

The cleaner placed some laundry in front of the plaintiff's cell door, called out for the correctional officer in the safety post to open the door so the plaintiff could get his laundry. The inmate cleaner stepped back into his own cell. The officer thought he locked the cleaner's door and then unlocked the plaintiff's door. Evidently the inmate cleaners door was not locked, he pushed it open, and rushed to the plaintiff's cell. There, he began to punch and kick the plaintiff. The officer, who could not leave his post, advised the men over the intercom to stop fighting and return to their cells. Two back up officers were called but concluded it was unsafe to enter the range without additional backup. They shouted

orders to the two men to stop fighting. After two minutes of repeated punching by the inmate cleaner, both men tired and were eventually returned to their cells by correctional officers. The plaintiff was examined by a doctor and treated for facial lacerations, abrasions, and a broken tooth.

Negligence

To prove a case of negligence, the plaintiff must establish the following:

- the correctional authorities owed him a duty of care;
- they breached the duty of care required, and
- the injuries he sustained were caused by the breach of the duty.

Justice Lafreniere of the Federal Court of Canada concluded the "duty of reasonable care [by prison officials] to safeguard prisoners in their custody or control from attack by other inmates…will vary commensurate with the risk to the inmate". Since the plaintiff had a reputation as a sexual offender, he was at risk to be harmed by other inmates, which was the reason he was involuntarily placed in segregation. Thus, correctional officers working in segregation were required "to exercise great care in monitoring [his] movements and limiting as much as possible any opportunities for retaliation by other inmates". In this case, the officer "failed to properly secure [the plaintiff's] cell door and prematurely opened [the inmate cleaner's] door, in breach of unit policy, thereby placing [the plaintiff] in danger". Although the error was nothing more than a lapse in judgment, the assault was a direct and foreseeable consequence of this failure. The plaintiff was awarded $5000 for general damages.

Complete case available at www.fct-cf.gc.ca

Note-able Quote

"A simple man believes anything, but a prudent man gives thought to his steps" Proverbs 14:15

MOMENTARY DELAY IN ARREST DOES NOT DISGRACE JUSTICE

R. v. Lee & Wu,
(2002) Docket:C33056 & C33160 (OntCA)

During a Canadian Airlines flight from Hong Kong to Pearson International Airport, several members of the crew became suspicious of the two accused Lee and Wu, who were passengers aboard the flight. They were observed switching bags and entering various washrooms from which banging noises could be heard. The pilot sent a teletype message regarding the suspicious behaviour to the airlines office in Toronto which was forwarded to Canada Customs. Following the airplane's arrival, a search of the washrooms was conducted and bricks of heroin were found. The secondary inspection area was notified to be on the lookout for the men, but it was reported they had already been released. Lee was spotted in the arrivals lobby, escorted back to the secondary inspection and questioned. Lee stated he was visiting a cousin and provided his cousin's telephone number. The cousin, who turned out to be Wu, was called and stated he would be at the airport in half an hour to pick up Lee. Lee was arrested, and when Wu arrived at the airport he was also arrested.

Both men were fingerprinted after the arrest and their luggage, airline tickets, and boarding passes were seized as evidence. Sixty bricks of heroin (42 kgs.) worth $50,400,000 were found behind the walls in six of the airplanes washrooms. Three of the accused Lee's fingerprints and 8 of accused Wu's fingerprints were found on 11 of the heroin bricks. The trial judge concluded that at the time the men returned to the secondary inspection area they were not "detained" for the purpose of the *Charter* and thus neither s.9 (arbitrary detention) or s.10 (right to counsel) were violated. Furthermore, the fingerprinting and search of the accused were not unreasonable and therefore did not violate s.8 of the *Charter*.

They were convicted of importing heroin by a judge and jury but appealed arguing, among other grounds, that the trial judge erred in admitting Lee's fingerprints and the documents seized from him. Lee suggested that his rights under s.8, 9, and 10 were violated and the evidence should have been inadmissible under s.24(2) of the *Charter*.

Admissibility of Evidence

Once the customs officer was informed of the discovery of the heroin and the contents of the teletype sent by the pilot, the subjective and objective grounds for arrest were "overwhelming". The "fingerprints were taken after the lawful arrest. Accordingly there was no s.8 violation with respect to them". Moreover, even if the trial judge erred in his assessment of whether the accused Lee was "detained", s.24(2) was applied appropriately. Although the arresting officer delayed the arrest of Lee for a few minutes after he was brought back to the secondary inspection area (the officer was "overly cautious about her suspicions and wanted to make sure she had subjective grounds"), this "extreme caution to arrest" did not create "a serious *Charter* breach". Thus the delay in arrest after the "alleged unlawful detention" could only be characterized as a minimal breach and did not warrant the exclusion of evidence. Admitting the physical, non-conscripted evidence obtained after the arrest simply because the officer hesitated in making a lawful arrest would not bring the administration of justice into disrepute. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

RETRO LESSONS FROM MAYBERRY

Deputy Barney: How does one acquire good judgment?
Sheriff Andy: I guess it comes from experience.
Deputy Barney: How do you get experience?
Sheriff Andy: From getting kicked around a little bit.

GOLDEN KEY PROVES POSSESSION

R. v. Vu, 2002 BCCA 659

The police executed a *Controlled Drugs and Substances Act* search warrant at a rural property with two vacant residences and several large barns, one of which contained 1,878 marihuana plants and grow equipment. The driveway leading up to the barns had a chain across it between two metal poles. While searching the property, the accused arrived as a passenger in a vehicle, exited, and was observed taking the chain off the post. He was arrested by police and searched. In his front pants pocket the police found $1,100 in cash and a gold key that opened the only lock securing the barn containing the marihuana. Although the accused and one of his companions testified at trial that they were at the property after being provided the key to do some cleanup work, the judge convicted him of possession of marihuana for the purpose of trafficking. However, he was acquitted of production of marihuana and theft of electricity. The accused appealed to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in finding he had the necessary knowledge and control of the grow and that a conviction for possession and an acquittal of production were inconsistent and therefore unreasonable.

Knowledge and Control

In proving possession, the Crown bears the burden of proving that the accused had knowledge of and some measure of control over the marihuana. In this case, the trial judge concluded:

> I find that the accused's possession of the key to the lock on the door to the grow op is proof of control over the drugs inside. Even though the accused was not found inside the building, possession of the key proves control. In fact, possession of the key is, in my opinion, a stronger indicator of control than mere presence in a

> building. A locked door and the key to that door is the very essence of control.

On appeal, the accused submitted that knowledge and control were not the only reasonable inferences to be drawn from the circumstantial evidence. Justice Rowles, for the unanimous British Columbia Court of Appeal, wrote:

> Whether an inference as to knowledge and control can be drawn by a trier of fact is a matter to be examined in light of the particular facts and circumstances of each case. In the circumstances of this case, the [accused's] possession of the key to the only lock on the barn where the growing operation was located is sufficient evidence to support the inference of control.
>
> The following evidence supports an inference of knowledge: the [accused's] attendance at the property, his possession of a key that opened the only lock on the barn containing the growing operation, the extensive nature of the operation and its very high commercial value, the daily attention needed to maintain the health of the marihuana plants, the residences on the property being unoccupied at the time, and the only use for the key being to open the padlock securing the barn.

Although other inferences from the facts are possible, there was no evidence to support an alternative.

Inconsistent Verdicts

In dismissing the accused's assertion that a conviction for a possession charge but an acquittal for production are incompatible, and therefore unreasonable, Justice Rowles stated:

> It is possible to possess marihuana for the purpose of trafficking without producing or cultivating it, since a conviction for possession for the purpose of trafficking requires proof of knowledge and an element of control but does not require any evidence of active participation in the growth of the plants. Contribution to the growth of plants is irrelevant to a finding of possession. For example, if the appellant was on the property to distribute the marihuana in the barn, it could hardly be said that he necessarily participated in the production of the plants.

The accused's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

WARRANT REQUIRES NO MORE THAN REASONABLE GROUNDS

R. v. Law, 2002 BCCA 594

A police officer was told by a colleague that the male occupant of a van entered a hydroponics store known as a place from which persons who grew marihuana would purchase equipment and supplies. Three days later, at 3:30 am, the police officer attended the registered owner's address (obtained from CPIC) and found the hydro meter spinning 6-8 times faster than two neighbouring residences. It was also noted that the windows were covered with blinds and that the garage windows had a "black-out" blind. The officer re-attended again at 3:30 am a day later and made the same observations (meter and blinds), but also found the van seen at the hydroponics store parked in the driveway.

After obtaining the hydro records for the residence, which suggested high electricity consumption, the officer applied for and was granted a search warrant under s.11 of the *Controlled Drugs and Substances Act*. As a result of the search, the accused was charged with and convicted of production of a controlled substance and possession of marihuana for the purpose of trafficking. The accused appealed to the British Columbia Court of Appeal arguing that the trial judge erred in finding that there were reasonable grounds to issue the warrant. He suggested that entering the "indoor gardening store", having closed blinds at night, and using more electricity than the neighbours would at best support a "suspicious possibility", but did not amount to reasonable grounds.

The test on review for the issuance of the search warrant is "whether the justice of the peace

acting judicially on the information before her could have concluded that [there were] reasonable…grounds to believe that an offence was being committed [at the residence]". Justice Huddart, writing for the unanimous appeal court, opined that reasonable grounds for belief (aka: reasonable belief, reasonable probability, or probable cause) simply requires enough evidence to amount to a minimum threshold of "credibly-based probability". In concluding that the test in this case had been satisfied, Justice Huddart, in dismissing the appeal, stated:

> It is true that each fact taken individually could have a legitimate alternate explanation that would weigh against an inference of criminal activity taking place in the house. It is equally true that more diligence could have been exercised by the investigating officer in obtaining evidence to support his application for a search warrant. But the justice of the peace made her decision on the basis of the evidence before her. The question for this court is not what additional evidence might have put the issue beyond debate, it is whether the entirety of the evidence before the justice of the peace was sufficient to give her reason to conclude "probability" had replaced "suspicion".
>
> When I have regard to the entirety of the evidence, I am persuaded it was reasonable for the justice of the peace to conclude from it that a marijuana-grow operation would probably be found in the house to be searched. The observation of the electric meters, combined with the hydro account said to be consistent with a grow operation, takes the evidence beyond the suspicion raised by the visit of a male to the hydroponic store from a motor vehicle registered to the [accused], to the probability required to invade the [accused's] privacy.

Complete case available at www.courts.gov.bc.ca

Note-able Quote

"*The reputation of policing suffers from the misdeeds of a few*" Author unknown

BY VACATING HOUSE, ACCUSED RELINQUISHED CONTROL OF GROW

R. v Lucani, 2002 BCCA 646

The accused and a second male, Sarjola, rented a two-story house with living quarters on the upper floor and a furnace and other equipment in the basement. The two men told the landlord that the accused would occupy the top floor while Sarjola would rent the basement. Sarjola stayed in the basement after setting up a cot. Both men each paid half the monthly rent to the landlord. On October 31st, 2000, the landlord received a call that Sarjola would now be solely responsible for the rent. On November 2nd the landlord went to collect the rent but also remembered that the outside water tap needed to be shut off from inside the house to prevent it from freezing. He entered the basement, found the grow operation, and promptly reported it to police. The police obtained a search warrant and executed it that same day. While the police were conducting the search, Sarjola arrived home, claimed responsibility for the grow operation, and told police the accused had moved out of the home. Nonetheless, the accused and Sarjola were charged with production of marihuana and possession for the purpose of trafficking dated November 2nd, 2000.

Although the accused did not testify at trial, his girlfriend did. She told the court she lived with him in the upper section of the house but had moved out on October 22nd or 23rd. The accused was convicted by the trial judge of possession for the purpose of trafficking, but acquitted of production. The trial judge concluded that the accused had the requisite knowledge of the grow as well as the capacity to exercise consent and control over it. He appealed to the British Columbia Court of Appeal arguing there was no evidence that the elements of possession

required to convict him existed (on November 2nd, 2000) after he had moved out of the house.

In setting aside the conviction and ordering an acquittal, Justice Esson for the unanimous British Columbia Court of Appeal stated:

> The vacating of the house and the attempts by [the accused] to persuade the landlord to agree that he had given notice of intention to quit are matters not inconsistent with his having formed a genuine intention to severe his relationship with Sarjola and with the property. I have some reservations whether the evidence was capable of establishing, that while he lived in the house, [the accused] was a party to the offence of possession but, in any event, that does not establish that he had any control in the time specified in the charge, i.e. on or about November 2. The evidence relied on by the trial judge to convict him was essentially all circumstantial. In my view, it was evidence consistent with the view that [the accused] had no connection or control over the grow operation at the relevant time.

Complete case available at www.courts.gov.bc.ca

NO NEED TO ENQUIRE ABOUT SUCCESS IN CONTACTING COUNSEL

R. v. Liew, 2002 ABCA 279

Following his arrest, the accused was given three police *Charter* warnings and was provided a telephone, and a telephone book. He was also made aware of a Legal Aid roster and made several telephone calls to a lawyer. He was then placed in a holding room with an undercover officer and engaged him in a conversation. The conversation was admitted at trial because it had not been elicited by the police. The accused had argued that he told the police he was unable to reach his lawyer of choice. The police denied this. The trial judge rejected the accused's assertion and held that his rights under s.10(b) of the *Charter* were not violated. The accused appealed to the Alberta Court of Appeal submitting that his *Charter* rights were violated and he was thus entitled to a new trial or a judicial stay of proceedings. In rejecting the accused's s.10(b) counsel of choice argument, Justice Ritter for the unanimous Alberta Court of Appeal stated:

> Once the police have informed an individual of his right to counsel, and have facilitated the exercise of that right, there is a positive duty on the individual to pursue that right….Absent unusual circumstances, there is no duty on the part of the police to enquire whether or not the individual has been successful in contacting counsel of choice. (references omitted)

Complete case available at www.albertacourts.ab.ca

BCCA UPS THE ANTE ON HOME INVASION ROBBERY

R. v. Whicher, 2002 BCCA 336

Armed with a knife, the accused, and his confederate entered the home of an elderly couple through an unlocked back door. While demanding money he waved his knife around, slashing wallpaper and cutting the telephone lines. Although the victims gave the men $300 from their wallets, they demanded more. The female victim was sexually assaulted by his companion while the accused confined her husband to a chair at knifepoint. The ordeal lasted for about half an hour and the female suffered bruises and loosened teeth. The 24 year old accused had a criminal record and substance abuse problem at the time of the offence. He plead guilty to break and enter and possession of a weapon and was sentenced to 10 years on the break and enter and a further 3 years concurrent on the weapons offence. The accused appealed his sentence arguing that is was unfit and a range of 5 to 8 years would be more appropriate. In unanimously dismissing the accused's sentencing appeal, the British Columbia Court of Appeal stated:

> Counsel for the Crown respondent in this case submitted that if earlier cases in this Court had

suggested a range of seven to ten years as being appropriate for this type of offence, then, in view of the increasing incidence of this class of offence and, the associated continuing violence to householders, some upward revision might be necessary. In my opinion, this submission of Crown counsel has merit. While sentences are but one tool, and often a rather blunt one at that, in dealing with persistent societal problems, courts must, by the sentences they impose, endeavour to curb violent behaviour. Violent lawbreaking is a particularly serious threat to an ordered society. The instances of violent home invasions in this province are all too frequent. It must be made clear that those who engage in such activity will, upon conviction, face significant penalties. It seems to me that a sentence range of 8 to 12 years should be considered an appropriate range for sentences in this class of case. Of course, here, we are speaking of planned home invasions, not cases of breaking and entering where violence is not contemplated. That kind of case is less serious, although there is always the regrettable danger in such cases that matters may go awry and unplanned violence may occur. As I noted earlier, Parliament has classed housebreaking as a very serious offence in any circumstances.

Although the above noted range can furnish a general guide, trial judges should not be unduly fettered in choosing an appropriate sentence, having regard to the widely varying factual circumstances of offences and offenders. Particularly egregious circumstances…may attract higher sentences. Correspondingly, a lower sentence may be thought appropriate for a relatively young offender who is perhaps led into a situation he or she did not fully appreciate might arise. What must be dealt with severely are the genus of break-ins and robberies that involve the violent invasion of residential premises that are occupied. These offences, perhaps particularly those that occur in the hours of darkness, are terrifying to the victims in particular and to the populace in general. In this class of case, deterrence, general and specific, assumes prime importance. (emphasis added)

Complete case available at www.courts.gov.bc.ca

Note-able Quote

"Charter rights are the rights of all people in Canada. They cannot be simply suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police as respected and admired agents of our country, must respect the Charter rights of all individuals, even those who appear to be the least worthy of respect[8]" SCC Justice Cory.

CROWN MUST PROVE CAUSE OF IMPAIRMENT

R. v. Jobin,
(2002) 165 C.C.C. (3d) 550 (QueCA)

A McDonald's restaurant drive through employee believed the male driver of a car was inebriated and was unable to drive. She noted an odour of alcohol, red and glassy eyes, difficulty speaking, and he appeared to not understand what she was saying to him. This was reported to police who responded and followed the accused for 10-15 km. They observed unprovoked sharp braking and his failure to make any turns even though his signal was flashing. After stopping the car, the officers observed the accused had difficulty getting out of the car, understanding their questions, and balancing. He swayed while standing and his eyes were bloodshot and his pupils dilated. Although the officers did not note an odour of liquor, the accused was arrested and transported to the police station where he provided two breath samples resulting in readings of 0mg%. The officers were surprised by the readings because they were inconsistent with the physical symptoms. Nonetheless, the accused was charged with impaired driving.

At trial the accused testified and advanced various innocent explanations for his condition and driving. These included:

[8] R. v. Stillman [1997] 1 S.C.R. 607 at para. 126.

- the odour of alcohol detected by the restaurant employee was from empty alcohol bottles he transported the day before;
- after signaling his intention to turn, he changed his mind; and
- his physical symptoms were a result of minor handicaps including deafness, a shortened leg bone, and a speech impediment.

Although he found alcohol was not the cause of impairment, the trial judge concluded the Crown had nonetheless proven the accused's ability to drive was impaired and convicted him. He appealed to the Superior Court of Quebec, but the conviction was confirmed. He again appealed, this time to the Quebec Court of Appeal, arguing that the Crown failed to prove the cause of impairment.

Justice Thibault, writing for the unanimous court, held that an essential element of a charge under s.253 of the *Criminal Code* requires proof beyond a reasonable doubt that impairment was from alcohol and/or a drug and not some other cause:

> …I am of the view that the text of s.253 of the *Criminal Code*…requires that the Crown prove, beyond a reasonable doubt, that the accused's faculties were impaired by alcohol, a drug, or both. The proposition according to which the mere observation of impairment would lead to the conviction of a driver of an automobile, does not respect either the letter of s.253 nor the intention of Parliament.
>
> The conduct which is criminalized is not driving while one's faculties are impaired—and impairment may be caused by fatigue, stress, a physical or mental handicap, etc.—but rather driving while one's ability is impaired by the consumption of a drug or alcohol. This is the scourge, which the *Criminal Code* intends to punish and eradicate, and nothing else.

In light of the trial judge concluding that the accused had not been drinking, and Crown's inability to link the impairment to a drug, the Quebec Court of Appeal entered an acquittal.

Complete case available at www.canlii.org

ARTICULABLE CAUSE IS MORE THAN AN INFORMED HUNCH

R. v. Harvie, 2002 BCPC 0441

A police officer was patrolling for impaired drivers around a hotel pub at closing (2am) when he noticed a taxi parked near an alley. The officer was aware that a known drug dealer currently on bail lived down the alley in a residence above a business premise. The residence however, was a different one than the dealer was charged with selling drugs from and the officer did not know whether the dealer was continuing to sell drugs out of his new residence. When the officer approached the driver of the taxi he observed a person exit the alley. The officer had seen a similar dressed person enter the alley 3 to 5 minutes earlier. Although the officer did not have grounds to arrest the person nor know if the person attended the residence of the drug dealer, the officer immediately detained him on suspicion of drug possession and conducted a safety search. The officer found cocaine and the person was charged with unlawfully possessing a controlled substance.

During a *voire dire* to determine the admissibility of evidence, Justice Doherty of the British Columbia Provincial Court concluded that the officer lacked an articulable cause and "the detention and subsequent arrest were arbitrary and unlawful". Justice Doherty stated:

> [T]he court has no wish to smother police initiative. Good police work involving police officers with a healthy scepticism or suspicion often results in the prevention of crime or the apprehension of criminals. Nor does the court want to render a decision that would put a police officer's personal safety in jeopardy because of a failure to search. The officer's safety issue is very much of concern. Having said that, the price of officer safety might well be that the search goes awry and this would appear to be such a case.

> In my view in the case at bar, the officer acted on little more than a hunch. It was an informed hunch but in the end it was a little more than that. While articulable cause may require something less than grounds to support an arrest it requires something more than a hunch, even an informed hunch. Had the officer been able to connect the accused with a visit to the known drug dealer's residence this case might have taken a different turn.

Complete case available at www.provincialcourt.bc.ca

A DIFFERENT SPIN…

What s. 10(b) of the *Charter* says…

Every one on arrest or detention has the right to retain and instruct counsel without delay and to be informed of that right.

What a defence lawyer would like a court to believe it says…

Every one on police questioning has the right to retain and instruct counsel without delay and to be informed of that right.

What s.9 of the *Charter* says…

Every one has the right to be free from arbitrary detention or arrest.

What a defence lawyer would like a court to believe it says…

Every one has the right to be free from any detention or arrest.

What s.8 of the *Charter* says…

Every one has the right to be secure against unreasonable search or seizure.

What a defence lawyer would like a court to believe it says…

Every one has the right to be secure against warrantless search or seizure.

PRIVATE BAILIFF IS NOT A PEACE OFFICER

R. v. Burns, 2002 MBCA 161

The accused, an employee of a private bailiff company, was charged with falsely representing himself to be a peace officer when he attended a vehicle lessee's place of employment to repossess the vehicle. When questioned by the lessee's employee about who he was, the accused represented himself to be employed by the Manitoba Sheriff's department. At trial, the accused was convicted under s.130(a) of the *Criminal Code*, which was confirmed on appeal to the Manitoba Court of Queen's Bench. The accused appealed further to the Manitoba Court of Appeal arguing that since he was a bailiff he was in fact a peace officer as defined in the *Criminal Code* and it is "not an offence for one kind of peace officer (a bailiff) to represent himself to be another kind of peace officer (a sheriff's officer)".

Although s. 2 of the *Criminal Code* defines a peace officer as including "a…bailiff…or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process", Justice Twaddle for the unanimous Manitoba Court of Appeal concluded that "a private bailiff is not a person of the kind encompassed by the definition of peace officer" in the *Code*. He stated:

> [T]he word "bailiff" has two meanings. In the first meaning, it refers to a person employed in an official capacity to serve a Crown-appointed officer (such as a sheriff) or a court. In the second meaning, it refers to an agent of a private person who collects rents or manages real estate.
>
> The accused was clearly not a "bailiff" within the first meaning. Although I have some doubt about his status as a "bailiff" under the second meaning, I will assume, for the purpose of this decision, that he was acting as a "bailiff" within the second meaning.

> Which meaning was intended by Parliament in defining "peace officer"? Or did Parliament intend to encompass both? I do not think there is any doubt that Parliament used the word solely in its first meaning. Everyone referred to in the definition section, other than a "bailiff," is patently a public or statutory officer performing public duties. There is no reason to believe that Parliament intended to include, as a peace officer, a person who was a private appointee performing non-public duties.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

CLUB POOL IS A 'PUBLIC SWIMMING AREA'

R. v. D'Angelo,
(2002) Docket:C36984 (OntCA)

The accused was convicted of the sexual interference of a minor under 14 years of age when he touched the victim with his mouth and penis. He was sentenced to 12 months community imprisonment, 3 years probation, which included a term that he not associate with children under 14, and a 10 year order under s.161 of the *Criminal Code* prohibiting him from attending a public swimming area where children under 14 were or could reasonably be expected to be. He was a 25 year resident of a community comprised of seven high rise buildings and numerous townhouses accommodating about 8,000 residents. He had gone swimming in the community club pool (used by owners or renters of the complex) where other people were using it including children under 14. The manager, who was aware of the accused's orders, called police. The accused was arrested and charged with breach of probation (s.733.1 *Criminal Code*) and breach of a prohibition order (s.161(4) *Criminal Code*).

At trial, the accused successfully argued that the pool was a private one. Since he lived in the complex, was a member of the club, and paid a membership fee to use it, the trial judge applied the definition of public place found in s.150 of the *Criminal Code* and concluded the club was not open to the general public—it therefore was not a "public" swimming area. The accused was acquitted of both charges but the Crown appealed to the Ontario Court of Appeal arguing that the club pool was a "public" swimming area.

In defining the meaning of "public" in the phrase "public swimming area", the accused submitted that it would need to be a facility operated or funded by government. In rejecting this narrow view, Justice MacPherson for the unanimous Ontario Court of Appeal found the word "public" was connected more to invitation and access rather than ownership or control. In applying the dictionary meaning of the words "public" and "public place" and the *Criminal Code* statutory definition of the phrase "public place", the Court of Appeal held that the community swimming pool fell within these definitions:

> The principal users of the pool are the residents of the Community itself. That community is a large one, about 8000 people; indeed, it is worth noting that the…Community is larger than many Ontario villages and towns. Moreover, there are many secondary and tertiary users of the pool. The secondary users are people from neighbouring communities who purchase club memberships. The tertiary users are non-members who use the pool for various classes and programs.
>
> Importantly, many of the users in all of these categories are children.

Furthermore, the Court examined s.161 and how its purpose would impact the meaning to be ascribed to a "public swimming area":

> Section 161…deals with…sexual offences. Many of the provisions in this part of the Code are designed to protect children from sick adults who prey on them for purposes of selfish sexual gratification. Adopting a narrow definition of "public swimming pool"-for example, one which excluded such large facilities as Wet and Wild Kingdom or Canada's Wonderland-would be a disservice to a particularly vulnerable group in Canadian Society.

The appeal was allowed, the acquittals set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

LACK OF BAD FAITH MITIGATES CHARTER BREACH

R. v. Nagra, 2002 BCCA 497

The accused was convicted of possession of cocaine for the purpose of trafficking after his car was stopped, searched without a warrant, and a duffle bag containing cocaine was found by police. The officer conducting the search testified he believed he had exigent circumstances and therefore relied on the warrantless search provisions of s.11(7) of the *Controlled Drugs and Substances Act* for justification. At trial the accused suggested that the search was warrantless and therefore violated his s.8 *Charter* right to be free from unreasonable search or seizure. Although the officer had reasonable grounds to conduct the search, the trial judge concluded there were no exigent circumstances justifying a warrantless search. However, the evidence was nonetheless admitted under s.24(2) of the *Charter*. In his s.24(2) admission/exclusion analysis, the trial judge stated:

> The onus at this stage is on the accused to establish on a balance of probabilities that admission of this evidence obtained by infringement of a *Charter* right would bring the administration of justice into disrepute. Good faith or bad faith by the police is relevant and the existence of other lawful means, namely obtaining a search warrant, makes the infringement more serious. There is no evidence here of bad faith on the part of the police, nor can it be said they were acting in good faith when they did not apparently directly apply their minds to their obligations under s. 11(7) of the C.D.S.A. I find their conduct was more lack of diligence than it was a deliberate and flagrant breach of *Charter* rights. The seriousness of the breach is mitigated somewhat due to the established lower expectation of privacy in an automobile travelling on a public highway, but overall I would assess the *Charter* breach as in the mid-range of seriousness.

The accused appealed, arguing the trial judge erred in holding that the police officer was not acting in bad faith and that the evidence should have been excluded. In assuming (without deciding) that the search was unreasonable, Justice Ryan for the British Columbia Court of Appeal dismissed the appeal. The trial judge neither erred in principle nor made an unreasonable finding.

Complete case available at www.courts.gov.bc.ca

CROWN MUST PROVE GUN LOADED AT RELEVANT TIME

R. v. Adiwal, 2002 BCCA 530

A police officer watching the home of the accused saw him open the rear hatch of a van and appear to search it while a second person stood watch. The officer heard what sounded like a gun being "racked" several times and saw the accused holding a firearm for about 20 seconds as the two men talked. He then put the gun back in the hatch area and closed it. The two men entered the van (the accused driving) and left the area. Fifteen minutes later the police stopped the van and there were now four males in it; the accused was in the passenger seat. In the rear of the vehicle under some carpeting police found a gun with one round in the magazine.

The accused was charged with and convicted of possessing a loaded prohibited firearm (a sawed off rifle) and being an occupant of a vehicle knowing there was a firearm. The accused appealed his conviction for possessing the loaded firearm by arguing, among other grounds, that the Crown failed to establish the rifle was loaded when the accused was seen handling it. In agreeing with the accused and entering an

acquittal, Justice Prowse for the unanimous British Columbia Court of Appeal stated:

> There was no direct evidence that the rifle was loaded at the time [the officer] saw it in the possession of the person he identified as [the accused]. While [the officer] stated that he heard a noise which he thought was a shotgun being "racked", he was not asked to elaborate on that evidence and he did not tie it to the issue of whether the rifle was loaded. The Crown did not suggest that we could take judicial notice of what the word "racked" means in this context, and we do not propose to do so.
>
> The only circumstantial evidence which relates to the issue of whether the rifle was loaded at the time it was seen in the possession of the person identified as [the accused] is the evidence that it had a bullet in the magazine approximately 15 minutes later at the scene of the takedown. In our view, this evidence, in itself, could not support a finding beyond a reasonable doubt that the gun was loaded at the time [the officer] said he saw it in the possession of the person he identified as [the accused]. By then, 15 minutes had elapsed, two further males had joined the group and, according to the evidence of [the officer], [the accused] had exchanged places in the vehicle.

Complete case available at www.courts.gov.bc.ca

'FISHING EXPEDITION' RENDERS CHILD PORN SEARCH UNREASONABLE

R. v. Fawthrop,
(2002) Docket: C36382 (OntCA)

A mother complained to the police that the accused, a family friend, engaged in improper sexual conduct with her daughter and had taken two Polaroid photographs of her private areas. Following interviews with the complainant and the victim, the investigator believed the accused was still in possession of the photographs. Suspecting he might also be a pedophile who possessed child pornography, the investigator consulted a psychiatrist with expertise in pedophilia who was of the opinion that pedophiles generally tend to collect and keep child pornographic materials.

Based on this information, the investigator obtained a warrant to search the accused's home for four items (cameras, film and negatives, developed photographs depicting the victim, and photo developing receipts) directly related to the offence she was investigating as well as "any pedophile collection which may or may not include" items such as magazines, videos, audio tapes, writings, computer discs, etc. The warrant was executed and the only item found directly related to the mother's complaint was a Polaroid camera. However, they also found and seized other child pornography. Although the charge in relation to the mother's complaint was withdrawn, a charge of possession of child pornography proceeded.

At trial, the investigator, who was present for, but did not participate in the actual search, was the only police officer to testify on the *voire dire*. The trial judge found that the psychiatrist did not have any contact with the accused and therefore could not say he was a pedophile. Consequently, there was no link between the accused and pedophilia sufficient to provide reasonable grounds to believe pornographic material existed at his home. Therefore, the warrant was severed with it being valid only to the extent it authorized the search for the four items directly related to the complaint, and invalid in so far as it authorized the search for the pedophile collection.

However, since the warrant was valid for the four items, the pedophile collection would have been found anyway during this valid portion of the search. Thus, its seizure was authorized by s.489(1) of the *Criminal Code* and the accused was convicted. Furthermore, even if he was wrong in holding the seizure lawful, the trial judge would have nonetheless admitted the evidence under s.24(2) of the *Charter*. The accused appealed to the Ontario Court of Appeal arguing, among other grounds, that the trial judge erred in finding the

seizure lawful under s.489(1) and in admitting the evidence.

The Seizure

Justice Borins (Justice Catzman concurring) found s.489 of the *Code* authorizes the seizure of items not specified in a search warrant if the police, while lawfully executing a warrant or otherwise in the execution of their duties, believe on reasonable grounds that the item has been obtained by, used in, or will provide evidence of the commission of an offence. Similarly, the common law plain view seizure doctrine would also allow the seizure of the pedophile collection if it was immediately obvious to, and was discovered inadvertently by, the officers executing the lawful portion of the search warrant. Both of these authorities only allow an officer to seize items that are visible during an otherwise lawful intrusion, but do not permit an affirmative search.

Since the only officer testifying was not physically involved in the search, there was no evidentiary foundation for the court to properly conclude that the items were in fact lawfully located under either s.489 or the plain view doctrine. Because the test "is not whether the police would have found the items in plain view… but whether they did [in fact] find the items in plain view", the search and seizure was unreasonable and thus a violation of s.8 of the *Charter*.

Admissibility of the Evidence

The search warrant process is meant to prevent a search based only on suspicion that a crime might have been committed, which is all the investigator had in this case with respect to the pornographic collection. The search based solely on suspicion was a 'fishing expedition' of the accused's home and rendered the s.8 *Charter* breach serious. Furthermore, the majority characterized the quantity of child pornography seized, which included 2 short stories and 35 images, 12 of which depicted a young girl engaged in fellatio, for the most part as small and relatively mild, thus the offence was relatively minor. In concluding the admission of the evidence would bring the administration of justice into disrepute and warranted exclusion, Justice Borins stated:

> In my view, in the circumstances of this case, to fail to exclude the impugned evidence would be to sanction the results of a fishing expedition engaged in by the police based on their suspicion that the appellant possessed what [the investigator] described as a "pedophile collection". To rule that the evidence is admissible would seriously diminish the appellant's s. 8 *Charter* rights by giving approval to the practice of obtaining a warrant to search for items which the police have reasonable grounds to believe may be found in an individual's home, and using the warrant as a means to engage in a fishing expedition for a shopping list of items which the police only suspect may also be located in the home. Stated somewhat differently, a failure to exclude the pedophile collection would enable the Crown to introduce evidence through the back door that it was unable to introduce through the front door.

Justice Simmons, in a dissenting opinion, agreed the trial record did not support the application of s.489 because the officer who actually seized the items did not testify. However, she believed the seriousness of the violation was mitigated because the police were acting in good faith. They would have been able to form one of the requisite beliefs under s.489 had they actually examined, on an item by item basis, the material they ultimately seized while looking for the two photographs related to the complaint and listed in the valid portion of the search warrant. In her view, the offence was serious and the admission of the evidence would not bring the administration of justice into disrepute.

The accused's conviction was set aside and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

THREATENING IMPOSSIBLE WARRANT RENDERS 'INFORMED' CONSENT INVALID

R. v. O'Connor,
(2002) Docket:C30841 (OntCA)

Police homicide investigators attempted to persuade the accused to consent to a search of his vehicle. They had previously interviewed him on three occasions and believed he was lying about his whereabouts at the time of the shooting. The vehicle owned by the accused was also similar in description to a vehicle seen by a resident driving off quickly from behind the murder victim's van after two gunshots were heard. At the time, the police did not have sufficient grounds to arrest the accused nor to apply for a warrant to search his vehicle. They read him a consent form advising him he did not have to consent to the search, that it could be withdrawn at any time, that they would be looking for evidence of blood, hair, fiber, and fingerprints, and that he had the right to counsel.

After being told he had the option of not letting the police take the truck, the accused said he did not want them to take it at that time. Reluctant to take no for an answer, the officers advised him they could seize the vehicle without consent at a time that was not convenient for him if they applied for and were granted a search warrant. After declining the police no less than nine times, the accused eventually agreed to give his truck to them. The accused signed the consent form after the police added the condition that the consent was only valid until noon the next day. As a result of a forensic search of the truck, police found a bloodspot on a piece of plastic molding covering the driver's seat hinge. After a warrant authorizing further detention and examination of the vehicle was subsequently obtained, police also found a greasy material on the windshield wiper blade. Both the blood spot and the greasy material were analyzed and matched the murder victim's DNA.

During the *voire dire*, the trial judge found the consent to be voluntary; free from police oppression or coercion. It had been made clear to him that he was free to withhold his consent and he ultimately decided to allow the police to search the truck. The evidence was admissible and the accused was convicted of second degree murder. The accused appealed his conviction to the Ontario Court of Appeal contending, among other grounds, that the trial judge erred in concluding that he consented to the warrantless search and that the evidence should have been excluded under s.24(2) of the *Charter*.

Consent

In establishing that a person waived their constitutional protection to privacy afforded by s.8 of the *Charter*, the Crown bears the burden of proving that the consent was not only voluntary, as the trial judge held in this case, but also informed. "Knowledge of the various options and an appreciation of the potential consequences of the choice made are essential to the making of a valid and effective choice". Although Justice O'Connor, writing for the unanimous appeal court, found the accused's consent voluntary, he concluded that it was not properly informed because the police misled him about the consequences of refusing to give his consent when they told him they could apply for a warrant even though they knew they did not have the requisite reasonable grounds. Justice O'Connor held:

> On two occasions, the police told the [accused] that if he refused to allow them to take his truck, they could apply for a search warrant and on the second occasion they also told him that if a warrant was granted, the truck could be seized at a time that would not necessarily be convenient to the appellant. Shortly afterwards, the [accused] agreed to sign the consent. The police knew that based on the information they had at the time they could not obtain a warrant. Although the police chose their words carefully so as to say only that they could ***apply*** for a warrant, not that they

could *obtain* a warrant, that distinction was likely lost on the [accused] and the message he would have received was that if he did not consent then the police would obtain a search warrant. The information provided by the police, while literally accurate, would likely have led the [accused] to believe that the police could obtain a warrant to search his truck at that point, when in fact they could not.

I agree with the Crown that in seeking the [accused's] consent to search his truck, it was not necessary for the police officers to advise the [accused] that they did not have the grounds to obtain a warrant. There would have been no problem if the police had not raised the subject of a warrant. However, once they chose to raise the matter, it was incumbent upon them to fully and fairly apprise the appellant of the correct situation, including the fact that they did not have sufficient grounds to obtain a warrant. Not only did they not do this, they described the situation in a way that likely led the appellant to believe that they could obtain a warrant. For that reason alone, I conclude that the [accused's] consent was not valid to waive his rights under s. 8 of the *Charter*.

Since the search warrant was obtained from information gathered during the initial tainted search, it too was invalid.

Admissibility of the Evidence

Although the s.8 breach of the accused's right was more than trivial or technical, its seriousness was mitigated by a number of factors. These included the following:

- The expectation of privacy in the truck was lower than that of a residence;
- The police were not on an 'unwarranted fishing expedition'. The police had a legitimate concern after interviewing the accused that he could destroy or remove evidence if they were unable to search the truck. In this respect, the circumstances involved urgency and necessity; and
- Aside from crossing the line in suggesting they could obtain a warrant, police otherwise conducted themselves properly and appropriately. They prepared a written consent form setting out the reasons for the search and choices open to him and made it clear that he could refuse consent and could contact counsel. They also took notes that accurately recorded their conversation with the accused.

As a consequence, the admission of this essential and non conscriptive, real evidence in a most serious crime would not bring the administration of justice into disrepute. However, the Ontario Court of Appeal quashed the conviction on other errors and ordered a new trial.

Complete case available at www.ontariocourts.on.ca

JURY TO BE CAUTIONED OVER POLICE COMMENTS IN STATEMENT

R. v. Stevenson, [2002] Q.J. No. 3213 (QueCA)

The accused was convicted of second degree murder by a jury for the most part on the testimony of a witness present at the time of the murder. The witness had pled guilty to second degree murder and agreed to testify as a prosecution witness. The outcome of the trial was largely determined by the jury's assessment of and ability to carefully weigh the credibility of both the accused and the prosecution witness. As part of the Crown's case, statements made by the accused after his arrest were introduced as evidence.

The statement was full of police comments suggesting the accused was "adjusting the truth", "lying", and "incapable of telling the truth", while the Crown witness was "not hiding the truth". The accused appealed suggesting, in part, that the trial judge erred in failing to properly instruct the jury to disregard these comments in assessing the witness's credibility or whether the

exculpatory parts of his statement raised a reasonable doubt of guilt. Justice Fish, for a unanimous Quebec Court of Appeal, stated:

> [Proper] instructions were necessary to avoid the danger that the jurors would be influenced by the impugned comments, believing that the investigators, on account of their professional training and experience, were better able to determine which suspect was lying and which was telling the truth.
>
> It should also have been made clear to the jurors in this context that their role, unlike that of the police, was to determine, on the basis of the evidence presented at trial, whether the guilt of the accused had been established beyond a reasonable doubt.

As a result of this and other errors, the Quebec Court of Appeal quashed the accused conviction and ordered a new trial.

Complete case available at www.canlii.org

"IN SERVICE: 10-8" AVAILABLE ON LINE

The "*In Service: 10-8*" newsletter is available on-line by logging onto the Justice Institute of British Columbia website at www.jibc.bc.ca and surfing through the Police Academy training links. If you have an interesting topic or information you would like to share with the police community, e-mail Sgt. Mike Novakowski at mnovakowski@jibc.bc.ca and your written article may appear in our newsletter.

Note-able Quote

"*A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty*". Sir Winston Churchill (1874-1965)

FORCIBLE ENTRY REQUIRES INTERFERENCE WITH PEACEABLE POSSESSION

R. v. J.D.,
(2002) Docket:C36071 (OntCA)

Police attended a break and enter and with the use of a police dog followed a scent to a nearby park where the accused, who matched the general description of the suspect, refused to stop when told to and quickly walked away to a residence and knocked on the door. A twelve-year-old boy recognized the accused when he answered the door. He told the boy, "Pretend I live here", entered the house, and proceeded to the back door. Noticing a police officer at the rear of the residence and the back door blocked by a couch, he went upstairs. An adult resident invited the police into the home and the accused was arrested coming down the stairs. The adult resident knew the accused, an acquaintance of her children, by name and was not surprised that he was in her home. He was convicted at trial of forcible entry under s.72(1) of the *Criminal Code* with respect to his entry.

Section 72(1) of the *Criminal Code* creates the hybrid offence of forcible entry:

> s.72 *Criminal Code*
> (1) A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.
> (1.1) For the purpose of subsection (1), it is immaterial whether or not a person is entitled to enter the real property or whether or not that person has any intention of taking possession of the real property.

After reviewing both the French and English wording of the section, Justice Doherty for the unanimous Ontario Court of Appeal found that mere entry into a premises is insufficient to warrant a conviction under this section. The

section requires "a taking of possession [of the property] in the sense of an interference with the peaceable possession of the person in actual possession", done in a manner likely to cause a breach of the peace or reasonable apprehension thereof. The intention need not be to permanently take possession of the property, but a brief taking could suffice. Justice Doherty wrote:

> For example, an intruder who forces his or her way into a home over the objection of the person in actual possession intending only to run through the house and out the back door would have no intention of taking over possession of the residence in any permanent sense. The intruder's conduct would, however, interfere, albeit briefly, with the owner's peaceable possession of the residence. On my reading of s.72(1) and s.72(1.1), the fact that the intruder intended only to run through the house and out the back door would not foreclose a conviction for forcible entry since there was a taking of possession in that there was an interference, a]albeit a brief one, with the peaceable possession of the person in actual possession of the property.

The Ontario Court of Appeal set aside the accused's conviction and entered an acquittal. His entry into the residence "was not accompanied by any force, violence, or threat of force or violence". He was admitted into the home and was not even a trespasser. Nor was there any evidence that he interfered with the family's peaceable possession of their property. Even if he had resisted during his arrest, that breach would not have resulted from the manner of his entry into the house, but rather would have been the product of events unrelated to the homeowner's continued peaceable possession. "The breach or the apprehended breach must flow from the manner in which possession of real property is taken and not from subsequent events".

Complete case available at www.ontariocourts.on.ca

DETENTION & SEARCH UNLAWFUL, BUT EVIDENCE ADMITTED

R. v. D.F., 2002 MBCA 171

The accused young offender (YO) was a passenger in a vehicle stopped by a police officer after it was observed fishtailing and being driven too fast for the road conditions. On approach to the vehicle, the officer saw the adult driver pass something to the YO. After the driver did not respond to the officer's request for his drivers licence, he was asked to turn off the vehicle and did so, only after receiving a nod from the YO. Before the driver, who admitted he did not have a licence, left the vehicle at the officer's request, he passed a cellular telephone to the YO. The driver was escorted to the police car, told he would be served with a provincial offence notice for driving without a licence, was frisk searched, and placed in the rear of the police car.

The officer conducted a computer check of the car and learned it was registered to a numbered company, but was not reported stolen. When questioned about the car, the driver gave evasive answers about ownership causing the officer to think the car might be stolen. As a result, he called for back-up. When back-up arrived, the officer told them of his observations and suspicions and asked them to deal with the YO while he continued to attend to the driver. The back-up officers approached the vehicle and asked the YO to step out and accompany them back to their police car. When told he would be searched for safety reasons before being placed in the police car, the YO reached down the front of his pants, stated he had some stuff he wanted to give them since they would find it anyway, and produced a bag with crack cocaine.

After he was arrested for possessing the cocaine, the YO was searched and placed in the rear of the police car. He identified himself and was

informed of his right to counsel and his right to contact a parent or other adult. However, his full rights under s.56(2) of the *Young Offenders Act* (*YOA*) were not explained to him in age appropriate language. The young offender was then questioned by police and provided incriminating answers. After transport to the police station, the YO was strip searched and questioned further. He was left in an interview room for about an hour before being moved to a second interview room where he was taken through the standard young offenders waiver form and advised of his rights accordingly. He waived his rights and subsequently provided the police with a written statement.

At his trial for possession of cocaine for the purpose of trafficking, the accused was convicted. The trial judge found the YO had been detained when he was asked to step from the car, but that there was nothing "unreasonable or ungovernable" about it. Furthermore, his initial oral statements were inadmissible because the police did not comply with s.56(2) of the *YOA*. However, the trial judge ruled the written statement admissible because it was obtained following compliance with the *YOA* and was taken at a different place and time. The YO appealed his conviction to the Manitoba Court of Appeal arguing the cocaine was produced "on threat of an unreasonable search following an unlawful detention" and the written statement was obtained under circumstances where the police failed to comply with the *YOA*.

The Detention

Using the two-prong analysis of the *Waterfield* test (a legal analysis for determining the common law powers of the police adopted from the English case of *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)) the Manitoba Court of Appeal concluded that the police were not justified in detaining the YO and consequently violated his s.9 *Charter* right to be free from arbitrary detention. When the police conduct constitutes a *prima facie* interference with a person's liberty or property (in this case the detention), the court must consider two questions:

(1) does the police conduct fall within the general scope of any duty imposed by statute or recognized at common law? and

(2) does the police conduct, albeit within the general scope of such a duty, involve an unjustifiable use of police powers associated with the duty? In assessing whether an actual interference was unjustified, "the interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference"[9].

Justice Twaddle, writing unanimously on this issue, held:

> In the case at bar, the vehicle in which the alleged young offender was a passenger had been stopped on account of driving offences. The driver was temporarily detained when it was discovered that he did not have a driver's licence. The alleged young offender as a passenger had no involvement in those offences. The police officers involved in the investigation had a suspicion that the vehicle might have been stolen, but did not know that to be the fact and the bases for their suspicion of the alleged young offender's complicity were tenuous at best.
>
> Apart from the alleged young offender's presence in the car as a passenger, the only bases for their suspicion were
>
> (i) the fact that the driver passed something to the alleged young offender as the first officer on the scene approached the car;
> (ii) the fact that, when asked to turn off his engine, the driver appeared to do so only on a nod by the alleged young offender; and
> (iii) the fact that the driver passed a cellular phone to the alleged young offender immediately before getting out of the car.

[9] *Dedman v. The Queen et al.*, [1985] 2 S.C.R. 2).

> Neither alone nor in combination do any of these bases justify the detention of the alleged young offender for questioning.
>
> In these circumstances, the police direction that the alleged young offender get out of the car and accompany them to theirs was prima facie an unlawful interference with the alleged young offender's liberty. Even if their detention of the alleged young offender for questioning can be said to fall within the broadly defined duties of the police (a conclusion which I doubt), I do not see it as necessary or reasonable for the police to have detained the passenger, when the driver had already been detained and they had grounds on which they could deny him the right to drive the car away. The important public purpose to be served was the recovery of stolen property, if stolen it proved to be, and that could be accomplished without the alleged young offender's involvement.
>
> The trial judge found nothing "unreasonable or ungovernable" about the detention, but failed to identify either the particular police duty which made the detention necessary or the public purpose which was served by interference with the alleged young offender's liberty. That being so, I find no proper basis for the judge's finding. In my view, the detention was unlawful.

The Search

In ruling the search the product of an arbitrary detention and thus unreasonable (a s.8 *Charter* violation), Justice Twaddle wrote:

> The search which was threatened following the detention was solely for the purpose of securing officer safety. It would have been unnecessary but for the unlawful detention. In the circumstances, the threatened search was unauthorized by law and consequently unreasonable.
>
> It is true that the threatened search was never carried out. The alleged young offender, recognizing his vulnerability to a search, produced the cocaine to the officers. In my opinion, however, these facts do not negate the otherwise obvious conclusion that the evidence of the alleged young offender's possession of cocaine was obtained as a result of an arbitrary detention and an unreasonable search. The right to be secure against unreasonable search, in my opinion, includes a right to be secure against the threat of one where the threat is made when those making it have the immediate ability to carry it out.

The Written Statement

Even if the written statement had been obtained after the strict compliance of s.56(2) of the *YOA*, it should have been inadmissible because the oral statements, which were not taken in compliance with the *YOA*, were "substantial factors leading to the making of the written statement".

Admissibility of the Evidence

The court was in agreement that the YO's rights under s.8 and s.9 of the *Charter* and s.56(2) of the *YOA* had been violated. However, it was divided on the admissibility of the cocaine as evidence. Justice Huband and Justice Kroft concluded that the cocaine was admissible under s.24(2) of the *Charter*. Characterizing the detention as "being on the borderline of reasonable and certainly understandable", they found the *Charter* breaches "to have been the product of carelessness in the execution of duties rather than design". They were not deliberate or willful. Justice Huband stated:.

> In my opinion, an informed citizen concerned about the operation of our laws and the rights of accused persons, but also conscious of the need to apprehend those involved in serious criminal behaviour, would not be troubled by the admission of this evidence under the circumstances of this case. Nor would the admission of the evidence be seen as condoning improper police behaviour. Whenever Charter breaches have been identified, it is cause for concern. Whenever that occurs, it places in jeopardy the outcome of an otherwise successful prosecution, and that is something that police officials from the highest to the lowest-ranking officer will be at pains to avoid in the future.

Justice Twaddle, on the other hand, would have excluded the evidence under s.24(2). He found

that the *Charter* breaches were more than technical and that the officers could have asked for identification without placing the YO in the police car, thus averting the need to search him. The officers exhibited a somewhat cavalier attitude towards the YO which was compounded by questioning him without complying with the terms of s.56 of the *YOA*. Finally, Justice Twaddle suggested "a scolding of the officers for their violation of the alleged young offender's rights is scarcely consolation for the alleged young offender or a real inducement to other officers to respect an individual's rights". In his view, "by admitting the evidence, the court might be seen to condone the police adoption of a cavalier attitude to the *Charter* rights of individuals" which "in the long run…would do greater harm to the public interest than the acquittal of the alleged young offender".

The appeal was allowed and a new trial was ordered, with the cocaine being admissible but the written statement excluded.

Complete case available at www.canlii.org

PRESUMPTIVE CARE & CONTROL: INTENT, NOT ABILITY, VITAL

R. v. MacAulay, 2002 PESCAD 24

A citizen found the accused passed out in the driver's seat of his truck stopped at the side of the road. The engine was running, the vehicle was in drive, the lights were on, and the accused had his foot on the brake. His seat belt was on and a strong odour of alcohol was smelled coming from him. After briefly awakening him to see if he was alright, the citizen put the truck in park, shut off the engine, took the keys, and called the police. An officer attended and found the accused asleep in the driver's seat. After observing symptoms consistent with impairment, the officer formed reasonable grounds to believe he was impaired and requested samples of his breath.

At trial, the judge concluded that even though the citizen had removed the keys from the vehicle prior to police arrival, the accused was still in care and control of his truck at the time the officer found him. The accused was convicted of care and control of a motor vehicle with a BAC in excess of 80mg% contrary to s.253(b) of the *Criminal Code*. The accused successfully appealed to the Prince Edward Island Supreme Court. Although the accused was in care and control when the citizen found him, once the keys were removed from the truck neither presumptive care and control nor actual care and control had been proven. Since the time between the readings and when the citizen found the accused were outside the two hour limit, the Crown was not entitled to rely of the certificate of qualified technician.

On further appeal by Crown to the Prince Edward Island Court of Appeal, the accused's acquittal was overturned and his conviction was restored. Section 258(1)(a) of the *Criminal Code* creates "a presumption of the *actus reus* and *mens rea* of "care and control" arising from being found in the driver's seat" of a vehicle:

> s.258(1)(a) *Criminal Code*
> In any proceedings under…section 253…(a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle…the accused shall be deemed to have had care and control of the vehicle…unless the accused establishes that the accused did not occupy that seat or position for the <u>purpose</u> of setting the vehicle…in motion…

The word "purpose" in this subsection refers to <u>intent</u>, not <u>ability</u>. Thus, if an accused is found in the driver's seat and fails to prove on a balance of probabilities that they did not intend on driving, they are deemed to be in care and control. Proof that the accused did not have the means or ability to put the vehicle in motion does not rebut the presumption. Furthermore, it is the accused who must prove lack of intent to drive or set the

vehicle in motion. It is not necessary that the Crown prove the accused intended to drive. In most cases, the accused will need to testify as to their purpose for being in the driver's seat or face conviction. In concluding that the accused was in presumptive care and control even though a third party removed the keys, Chief Justice Mitchell (Justice Webber concurring) stated:

> The question therefore becomes whether there is proof on a balance of probabilities that at the material time the [accused] did not occupy the driver's seat for the "purpose" of putting the vehicle in motion. It is the purpose of the occupant, not his or her means or ability, that Parliament chose to address in s-s.258(1)(a). Although the absence of means may in some cases be evidence of purpose, the fact that an occupant of the driver's seat does not have keys to the vehicle does not, by itself, overcome the presumption in s.258(1)(a). The main question is not whether the occupant of the driver's seat had a key to the ignition. The critical issue is his or her purpose in occupying that seat. If an accused found occupying the driver's seat testifies that he was not there for the purpose of putting the vehicle in motion, evidence that he did not have keys will tend to support his statement. However, the lack of a key alone does not prove an occupant of the driver's seat was not there for the purpose of putting the vehicle in motion. A motor vehicle is still a motor vehicle within the meaning of s. 253 regardless of whether the person in the driver's seat has the keys. The fundamental objective of Parliament in enacting s. 258(1)(a) was to keep intoxicated people from even getting into the driver's seat of a motor vehicle.

In this case, the majority of the appeal court held that the accused had failed to rebut presumptive care and control. He was in care and control before the keys were removed and this continued after their removal. He remained seat belted in the driver's position and called no evidence to demonstrate a change in purpose.

In a dissenting judgment, Justice McQuaid was of the opinion that depriving the accused of an ability or means to put the vehicle in motion alters their purpose for occupying the driver's seat. In his view, the presumption found in s.258(1)(a) of the *Code* was rebutted, and care and control was not proven. He would have dismissed the appeal and allowed the acquittal to stand.

Complete case available at www.canlii.org

BEING CRAMPED & ANXIOUS IS NOT A REASONABLE EXCUSE IN FAILING TO BLOW

R. v. Lewko, 2002 SKCA 121

A police officer stopped the accused for dangerous driving and detected an odour of alcohol. He was requested to provide a sample of his breath into a roadside screening device. He voluntarily assumed a position in the backseat of the patrol car and was permitted three attempts to provide an adequate sample. The first blow was not hard enough, the second blow was not long enough, and on the third blow the officer felt he was sucking back. The accused was charged with impaired driving and failing or refusing, without reasonable excuse, to comply with a demand.

At trial, the accused testified he was cramped when he tried to provide the sample. While sitting in the back seat, his knees were to his chest as he leaned forward to blow into the device held by the officer seated in the front. He also stated he was frightened during the ordeal. The accused called an expert in the mechanics of breathing and the effects of stress on it. The expert testified that a person hunched over in a cramped position and suffering from respiratory anxiety results in shallow, rapid breathing and could not be able to completely fill their lungs like they would if they were standing upright. This became the accused's excuse for failing to provide the required sample.

The trial judge rejected this argument as a reasonable excuse and convicted the accused. The

judge concluded that people can somewhat control their breathing even under stressful situations. The accused was aware he was required to provide a breath sample, but took no steps to neither remedy the situation nor bring it to the attention of the officer. The accused successfully appealed his conviction to the Saskatchewan Court of Queen's Bench. In ordering a new trial, Justice Smith found the trial judge erred in his analysis of the nature of the defence of reasonable excuse and the standard of proof required. The Crown appealed to the Saskatchewan Court of Appeal.

Crown's Obligation

Section 254(5) of the *Criminal Code* creates an offence for a person to fail or refuse, without reasonable excuse, to comply with a demand by a peace officer made under s.254. Under this section there are three types of demands:

- approved screening device demand upon reasonable suspicion person has alcohol in their body (s.254(2))
- approved instrument demand upon reasonable and probable grounds person has committed an offence under s.253 *Criminal Code*-impaired driving by alcohol or over 80mg% (s.254(3)(a))
- Blood sample demand upon reasonable and probable grounds person has committed an offence under s.253 *Criminal Code*-impaired driving by alcohol or over 80mg%-and the person is incapable of providing or it would be impracticable to obtain a breath sample (s.254(3)(b)).

There are three elements the Crown must prove beyond a reasonable doubt to secure a conviction for failing or refusing to provide a sample:

1. the existence of a demand having the requirements of one of the three types of demands under s.254
2. the failure or refusal by the accused to provide the required sample of breath or blood (the *actus reus*)
3. the accused intended to produce the failure or refusal (the *mens rea*)

Once these three elements are established, the accused will be convicted unless they raise a defence in the ordinary sense, or provide a reasonable excuse.

Establishing a Reasonable Excuse

Stage 1-Putting the issue into play

Initially, the accused has the "evidential burden of producing sufficient evidence of something that is capable of being a reasonable excuse". This is not a persuasive burden on a balance of probabilities, but only requires raising the "question of the possibility of a reasonable excuse". This can be accomplished through the accused's testimony, or from other defence or Crown witnesses.

Stage 2-Is the excuse prescribed by law?

Once the court has determined the accused has satisfied the evidential burden of raising a reasonable excuse, the judge must establish whether the "particular excuse [is] capable in law of being a reasonable excuse". This is a question of law to be decided by the judge.

Stage 3-Crown's rebuttal

The judge will decide the substantive merits of the reasonable excuse by examining the credibility of the witnesses, weighing the evidence, and settling questions of fact. If the accused has satisfied the evidential burden by raising a reasonable excuse supported by law, the Crown must rebut the excuse and in doing so bears the burden of proving beyond a reasonable doubt that the excuse does not work in favour of the accused.

Stage 4-Final evaluation

This final stage involves the judge evaluating the facts and making a decision on whether or not the excuse operates in favour of the accused and therefore results in an acquittal.

The Cramped/Anxious Defence

In this case, the unanimous Saskatchewan Court of Appeal concluded that the trial judge did not err and the accused's "voluntary assumption of a cramped position in a motor vehicle while attempting to provide a sample of his breath coupled with his anxiety…is not, as a matter of law, capable of constituting a 'reasonable excuse'". The appeal was allowed, the order for a new trial was set aside, and the accused's conviction was restored.

Complete case available at www.canlii.org

NOT USING AVAILABLE RECORDING EQUIPMENT RENDERS CONFESSION SUSPECT

R. v. Ahmed,
(2002) Docket:C37978 (OntCA)

The accused was arrested for robbery two nights after two men stole the victim's wallet at knifepoint. Upon arrest he had told the officers that he did not commit the robbery. The arresting officer transported the accused to the station and placed him in an interview room. A detective, whose duty it was to investigate prisoners brought in by uniformed officers, entered the room and told the accused he required personal particulars such as address, age, height, weight, etc. to complete a pre-printed form recording the arrest. At that point, the accused blurted out that he lied to the other officers and he confessed to committing the robbery. The accused was told by the detective to stop speaking and arrangements were made for him to speak to duty counsel. After speaking to a lawyer, the accused declined to speak further with the detective, who subsequently completed his paperwork.

During the *voire dire* to determine the admissibility of the confession, the detective testified he did not use force, threaten, or suggest it would be better if the accused provided a statement. The accused testified that this was his first arrest and he confessed because he wanted to go home, not to jail. He told the court that after denying that he committed the robbery, the detective said, "You want to go home. Tell me the truth". He then confessed. Without providing any reasons, the trial judge accepted the detective's evidence as credible and rejected the accused's evidence. The trial judge ruled the statement admissible and together with identification evidence, which would not by itself support a conviction, found him guilty. The accused appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in ruling the confession voluntary

Voluntariness and the Failure to Record

The Crown bears the burden of proving that a statement made to a person in authority is voluntary beyond a reasonable doubt. Since there were no other witnesses present and the interaction was not recorded in any way, the voluntariness of the confession was a credibility contest between the evidence of the police officer and that of the accused. Although it is not fatal to a statement's admissibility that it was not recorded, in most circumstances the failure to record a confession will render it sufficiently suspect to raise a reasonable doubt about its voluntariness. Justice Feldman, for the unanimous Ontario Court of Appeal stated:

> The reason our courts have focused so heavily on the desirability of recording the interactions between police officers and accused persons upon arrest, is to avoid these credibility contests at trial on the crucial issue of whether any coercion, oppression or inducement led to the accused to

> make the impugned statement. …[A]s long as recording equipment is available, the failure to record will generally preclude a finding of voluntariness, except in circumstances where the police officer did not set out to interrogate the suspect. Consequently, the question of the officer's intention is also a critical one on the voire dire. Therefore, where there is no recording, and the issue of the officer's intention is in dispute, that is one of the circumstances where the trial judge must carefully analyze the conflicting evidence and give reasons which clearly explain why the judge either accepts the evidence of the police officer or officers, or conversely, why that evidence is rejected or insufficient to satisfy the judge beyond a reasonable doubt. (reference omitted)

The Crown submitted that there was no need to record the contact between the detective and the accused because the officer did not deliberately set out to interrogate him. He was simply attempting to obtain personal information to fill out a form. The accused, on the other hand, highlighted the fact that the detective was able to complete his paperwork with the required background information even though he never did ask the accused any questions about personal particulars. Furthermore, the detective never had any recording equipment when he went in to further interview him after he consulted counsel.

Because the trial judge failed to adequately explain the circumstances of the confession, failed to properly assess the evidence of the accused, and failed to provide reasons for disbelieving him about the alleged inducement, the conviction was set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"*In theory, there is no difference between theory and practice. But, in practice, there is*". Jan L.A. van de Snepscheut

PARENTAL SEARCH OF FOSTER CHILD's ROOM UNREASONABLE

R. v. I.D.K., 2002 BCPC 0536

The accused was a 16-year old foster child who had been placed in a foster home. As a rule there was to be no illegal activity including drug possession and the foster parents were required under their contract with the Ministry for Children and Families to report any illegal activity to the police. Furthermore, the accused was told by the foster parents that they could search his room if they suspected illegal activity. One day the foster father smelled burning marihuana coming from the accused's bedroom and searched it. He found marihuana under some clothes and reported it to the police. The accused was charged with possession of a controlled substance.

During the trial *voire dire* to determine the admissibility of the marihuana, British Columbia Provincial Court Justice Gove concluded that the search was unreasonable. Because the foster parents were under contract with the Ministry for Children and Families to report illegal activity to the police, they were acting as agents of the state. Justice Gove stated:

> I am satisfied that where foster parents, as here, were acting under contract with a government ministry requiring them to notify the police if they suspected or detected any illegal activity, they were agents of the police and therefore agents of the state. The foster parents were not in a similar position to parents who are under no obligation to contact the police if and when they detect illegal activities conducted by their children in their bedrooms.

Furthermore, the accused had a reasonable expectation of privacy in his bedroom. The accused had a statutory right to privacy, although somewhat limited, under British Columbia's *Child, Family and Community Service Act* (s.70(1)(d)). The foster parents testified they respected the bedroom as the accused's "own space" and did not

enter it without his presence. Daily visual inspections for cleanliness were done from the doorway and the accused brought his own laundry out of his room to be cleaned by the foster mother.

The search was conducted without a warrant and could not be justified within any of the exceptions to prior judicial authorization such as consent, plain view, or exigent circumstances. Thus, the accused's right to be secure against unreasonable search or seizure under s.8 of the *Charter* was violated. The evidence was excluded under s.24(2) of the *Charter*. Justice Gove held:

> The violation was not inadvertent but, rather, very deliberate. There were no emergency or security concerns. There were other investigative means that could have been employed
>
> .....
>
> …Young people, especially those in the care of government and for whom the state is their guardian, have less advantages and choices than those growing up within their families….Unlike a natural parent, the foster parents or care givers of children as demonstrated on the facts here, can not exercise a discretion on what to do if they find a foster child to be breaking the law. This may be understandable, given the need to regiment care giving. However, from the point of view of the foster child, he or she is being treated differently than one who lived with natural parents. Youth in the care of the Ministry are treated in a different manner than other young people.
>
> …Allowing youth in care to be treated in a different manner than other youth, resulting in breaches of their rights under the *Charter*, would bring the respect for the law and administration of justice into disrepute.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"*Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws*". Plato (427-347 B.C.)

ACCOMPANYING ARRESTEE INTO BEDROOM TO CHANGE CLOTHES NOT A SEARCH

R. v. Benbow, 2002 BCPC 0516

Police responded to a dispatched report of a break and enter in progress at a residence to determine whether it was actually occurring and to inquire about the safety of any occupants. The accused, an adult female occupant of the home, opened the back door at the kitchen and assured the police that everything was all right. Officers detected an overwhelming odour of growing marihuana coming from the house and arrested the accused at the doorway. She was dressed in pajamas.

Police facilitated her request to change into street clothes by having a female police officer attend and accompany the accused into her bedroom to keep her under observation and ensure officer safety. While changing her clothes, she opened a drawer and the female officer observed a Marihuana Grower's Handbook. While leaving to obtain a warrant, the investigating officer observed mould and condensation on the basement windows. A search warrant was issued and executed on the basis of the odour, the book, and the windows. Police subsequently found 108 marihuana plants and other cultivation equipment.

During the trial *voire dire* to determine the admissibility of the evidence, the accused argued that the police conducted a warrantless search when they were in the kitchen and while accompanying her into the bedroom. However, British Columbia Provincial Court Justice Gove concluded that there was no search. The police were responding to a call of a break and enter in progress and were offering assistance to the home. The only reason that the police entered the residence was to assist the accused at her request to change her clothes. The police were showing "decency and common sense". The

handbook was observed in plain view while accompanying the accused in her room and the window condensation was noticed while the police were lawfully on the property. Thus, the search warrant issued on the basis of these grounds was valid and did not breach the accused's *Charter* rights. The evidence was ruled admissible.

Complete case available at www.provincialcourt.bc.ca

PDW REQUIRES DANGEROUS INTENT PRIOR TO USE

R. v. MacDonald,
(2002) Docket:C37456 (OntCA)

The accused confronted his wife in the driveway of their home as she was about to drive away with their 20 year old daughter to go shopping. They were separated from each other but living in the same residence. The accused had been physically abusive towards his wife in the past. The accused's wife had various papers with her that included some he believed were his personal documents and would be used by her lawyer in gaining advantage in the ongoing divorce proceedings. The accused ran towards the van, stood in front of it preventing his wife from leaving, yelled at her, and demanded the papers be returned.

After she refused, he became angry and verbally abusive and tried to lift the hood of the van so his wife could not see ahead. The accused increasingly became upset and took a jack knife he carried with him and used around the farm from his pocket stating, "Fine then, I 'll slash the tires". As he bent down beside the vehicle, his wife moved the vehicle forward and struck him with the side view mirror of the van. The accused stood up very close to the driver's side window, held the open jack knife at chest level, and calmly stated, "You're next". His wife took this to mean that she would receive another beating. The accused testified he threatened to let the air out of the tires to intimidate his wife into returning the documents and he was going to use the tip of the knife to press down on the tire valve to let the air out. He denied saying, "You're next".

The accused was convicted of uttering threats and possession of a weapon for a purpose dangerous to the public peace. The trial judge concluded that the words "You're next", in light of the circumstances, was a threat to cause death or serious injury and that the accused intended, by his own admission, to intimidate and frighten his wife. Furthermore, although the initial possession of the jack knife was lawful, the possession was changed to an unlawful purpose when he removed it from his pocket to intimidate and frighten his wife in an effort to retrieve his papers. The accused successfully appealed to the Ontario Superior Court of Justice. In overturning the accused's convictions and entering acquittals, Justice Jenkins was of the opinion that the wife was not concerned about her safety at the time. Further, the trial judge erred in his analysis of the evidence by relying entirely on the evidence of the wife and disregarded the evidence of the accused. The Crown appealed to the Ontario Court of Appeal.

Uttering Threats

The *actus reus* for the offence of threatening is the uttering of threats of death or bodily harm. This is to be viewed objectively by considering the circumstances surrounding the utterance, the manner in which the threat was uttered, and to whom the threat was made. A subjective state of fear is not required. Justice Doherty, writing for the unanimous Ontario Court of Appeal stated:

> [I]t is not an essential element of the offence that the person subjected to the threat actually fear for his or her own safety as a result of the threat. Indeed, that person does not even have to know that the threat was made. The reaction of the person threatened is of evidentiary significance only. (references omitted)

The *mens rea* of threatening is that the words uttered were meant to intimidate or be taken

seriously. In this case, "the trial judge was entitled to consider the words spoken, the history between [the accused and his wife], the immediate context, including the [accused's] anger, and his possession of an opened jack-knife, as well as the [accused's] own admission that he intended to intimidate and frighten [his wife]".

Weapons Charge

Section 88 of the *Criminal Code* creates an offence for a person to possess a weapon for a purpose dangerous to the public peace. In proving this offence, the Crown must establish the following three elements:

1. **the jack-knife was in possession of the accused**. In this case, there was no doubt he was in possession of the jack-knife.

2. **the jack-knife was a weapon**. Weapon is defined in s.2 of the *Criminal Code* as "any thing used…for the purpose of threatening or intimidating any person". By the accused's own admission, he used the jack-knife to frighten and intimidate his wife.

3. **the purpose for which the accused had possession of the jack-knife was dangerous to the public peace**. This intention must be formed before actually using it. Thus, where a person is lawfully in possession of a weapon and uses it on the sudden without premeditation for its use, no offence is committed. However, in this case it was reasonable for a court to conclude that the accused's lawful possession of the knife changed to a possession for a purpose dangerous to the public peace when he formed the intention to frighten his wife before removing the knife, opening it, and using it to intimidate her.

The acquittals were set aside and the convictions restored.

Complete case available at www.ontariocourts.on.ca

INCIDENTAL SEARCH MUST BE CONNECTED TO ARREST

R. v. Wakeling, 2002 BCPC 0525

The accused was driving in the company of his wife and four teenaged girls when police stopped him. The licence plate of the car he was driving was routinely queried on CPIC and found to be registered to a different vehicle and associated to a vehicle impound candidate. When told why he was being stopped, the accused exited the car, removed some items, including a briefcase, from the trunk and handed it to his wife. He also told her to call his lawyer. The passengers then departed the scene and went to a nearby gas station. Although the accused was not the impound candidate, the officer learned from CPIC that he was a prohibited driver and wanted on an outstanding arrest warrant. The accused was arrested, handcuffed, and placed in the police cruiser.

A CPIC query of the vehicle's VIN revealed that the car was stolen. The accused's wife returned from the gas station, but was not permitted to speak to him. The officer identified the wife and the teenage girls and sent them on their way. At this time neither the briefcase nor other items removed from the trunk were of any concern to the officer. Shortly after the passengers departed, the officer received additional CPIC information to contact the RCMP drug section because the vehicle was designated a "crime vehicle".

The officer made a general broadcast for other units to find the wife and search the briefcase. She was located and 13 ounces of cocaine, along with items connected to the accused, was found inside the briefcase. The accused was charged with possession of cocaine for the purpose of trafficking contrary to s.5(2) of the *Controlled Drugs and Substances Act*.

Search Incidental to Arrest

All warrantless searches are presumptively unreasonable and the onus is on the Crown to nonetheless establish that the search was reasonable. During the trial *voire dire* to determine the admissibility of the briefcase evidence, the Crown suggested that incidental to the arrest of the accused for possession of the stolen vehicle, the police were entitled to search the vehicle and anything contained in it in furtherance of that investigation. British Columbia Provincial Court Justice Gill agreed that the arresting officer could have searched the vehicle and briefcase incidental to the stolen property arrest. He stated:

> In my view an arresting officer who does not initially decide to search incidental to the arrest is not necessarily precluded from searching shortly thereafter, upon receipt of additional information connected to any proper grounds to arrest. Under those circumstances, a search of the briefcase approximately 20 minutes later and one kilometer from the scene, now in the possession of [the accused's wife], would have been entirely reasonable. However, that is not the reason the briefcase was searched. (emphasis added)

And further:

> The officer's decision to search the briefcase was made only when additional information came to light that the car was a "crime vehicle" and possibly associated with narcotics. However there was nothing in this new information directly implicating the accused, and this information would not have provided any additional grounds to arrest him. In fact the officer was clear in his testimony that while he may have been remiss in failing to examine the briefcase at the scene, his later decision to search the briefcase was made because he felt he was now dealing with a stolen vehicle connected to drugs, in other words, a "dual purpose" search ostensibly authorized by the fact of the accused's arrest for possession of stolen property. There is little doubt however, that the officer wanted to know if the briefcase contained narcotics. Indeed, crown conceded that the officer did not possess any reasonable and probable grounds to believe there to be anything unlawful in the briefcase, much less narcotics.

Since the police searched the briefcase for reasons (drugs) unconnected to the arrest (stolen property), it was not proper as an incident to arrest. Therefore, the search was not authorized by law and violated the accused's s.8 *Charter* right to be secure against unreasonable search or seizure. However, despite the *Charter* breach, the evidence was ruled admissible under s.24(2).

UNDERSTANDING ELEMENTS OF A CRIME

A criminal offence consists of two parts: a criminal act (the *actus reus*), accompanied contemporaneously by a prescribed state of mind (the *mens rea*). If either of these two elements is absent, there is no criminal offence committed. Many of the defences available in criminal law seek to suggest that one or the other of these elements is missing or not proven beyond a reasonable doubt by the Crown. Therefore, it is important for police officers investigating crimes to understand these elements when gathering evidence to support a conviction.

***Actus Reus (criminal act)* X *Mens Rea* (*guilty mind*) = Crime**

ACTUS REUS

Latin for "criminal act"

No matter how evil the intentions or thoughts of a person are, there can be no crime until there is some impugned act attributable to the accused. In other words, thoughts alone do not constitute a crime. Thus, every crime must have an *actus reus*.

Actus reus is sometimes referred to as the "physical act", "guilty act", or "wrongful act". Even though the *actus reus* will most often involve a prohibited act, it is more accurate to describe the *actus reus* as all parts of the crime other than the

mens rea. In determining the *actus reus* for a particular crime, it is necessary to examine the definition of the offence. The *actus reus* may take one of several forms including:

1. Overt physical act (the law seeks to prevent)

Many criminal offences take this form of *actus reus*, as they require some positive action be committed. An example is the definition of assault found in s.265(a) of the *Criminal Code*:

> A person commits an assault when…(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

In this definition, the non-consentual application of force to a person is the physical act.

2. An omission to perform a legal duty (omission offences)

Some criminal offences involve the failure to act where there is a legal duty to do so. An example is found in s.215(1(a) of the *Criminal Code*:

> Everyone is under a legal duty…(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;...

Section 215(2) creates an offence for a person who fails to perform the duty if the child is in destitute or necessitous circumstances or their life or health is endangered. Similarly, s.254(5) of the *Code* creates an offence for a person who fails to submit to a proper breath demand made by a police officer:

> Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

3. A state of affairs prohibited by law (state of being offence)

Some criminal offences require neither an overt act nor an omission. Rather, they require that a prohibited state of affairs, or state of being, exists at the time. There are many examples of this type of *actus reus* in possession offences. For example, s. 354(1) of the *Criminal Code* provides:

> Everyone commits an offence who has in his possession any property…knowing that all or part of the property …was obtained by or derived directly or indirectly from… (a) the commission in Canada of an offence punishable by indictment…

Thus, it is an offence to be in possession of property obtained through the commission of a crime, typically theft or robbery. This offence is sometimes referred to as "possession of stolen property". Being in possession of stolen property is the state of affairs prohibited by the law. Similarly, s.4(1) of the *Controlled Drugs and Substances Act* creates an offence for persons to knowingly possess controlled substances.

MENS REA

Latin for "guilty mind"

The *mens rea* is the required mental, blameworthy, criminal mental state, or fault element of a crime. In addition to proving the prohibited act, the Crown must also prove that the person meant or intended to commit it. It is not necessary that the accused intended to commit a crime; it is enough that they intended to do an act that is recognized by law as a crime. *Mens rea* is required because it is not in the interest of justice to punish persons who did not intend to commit a particular act or who have no control over their mental or physical processes. *Mens rea* can take many forms, or differing degrees, which include the following:

1. Intention

Foresight of a consequence plus a desire it come about

Generally, it is necessary that an accused intended to cause a consequence. For example, if person A hit person B without consent, then A is guilty of an assault only if A intended to hit B. If A hit B accidentally then no criminal offence is

committed. Intention is a required *mens rea* element in many offences and may be recognized by the wording of the offence, ("intentionally", "willfully" or "means to").

s.265(1)(a) *Criminal Code*
A person commits an assault when…(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

In this example, the required intent is to apply force.

General (or Basic) Intent

In a general intent offence, the acts are done to achieve an immediate consequence or result. For example, assault is committed when A intentionally hit B without consent. Unlike a specific intent offence, there is no additional or further intention in mind beyond the prohibited act itself.

Specific (or Particular) Intent

Some offences require a special, additional, or ulterior intent. In addition to the general intent, a specific intent attending the purpose for the commission of the act must be proven. These are called specific intent offences. For example, A's further intention in hitting B might be for the additional intent to steal B's money, which now renders the offender guilty of robbery.

s.343(c) *Criminal Code*
Every one commits robbery who …(c) assaults any person with intent to steal from him;

In general, specific intent offences are indicated by the words "with intent" or similar words such as "for the purpose of". A greater burden of proof is placed on the prosecution in a specific intent offence. That is, the prosecution must prove not only that the accused intentionally committed the prohibited act, but also that they committed the act with a specific intent. In *R. v. Bernard* [1988] 2 S.C.R. 833, Justice McIntyre of the Supreme Court of Canada described the difference between general and specific intent as follows:

> There is a world of difference between the man who in frustration or anger strikes out at his neighbour in a public house with no particular purpose or intent in mind, other than to perform the act of striking, and the man who strikes a similar blow with intent to cause death or injury. This difference is best illustrated by a consideration of the relationship between murder and manslaughter. He who kills intending to kill or cause bodily harm is guilty of murder, whereas he who has killed by the same act without such intent is convicted of manslaughter. The proof of the specific intent, that is, to kill or to cause bodily harm, is necessary in murder because the crime of murder is incomplete without it. No such intent is required, however, for the offence of manslaughter because it forms no part of the offence, manslaughter simply being an unlawful killing without the intent required for murder.

Intention and Motive

Intention and motive are not the same. Motive refers to some reason for committing a crime and is not part of the *mens rea* component. A person may commit a crime for a seemingly beneficial motive and still be found guilty. For example, in a mercy killing the accused's motive may be to relieve one from suffering. However, the *actus reus* (killing a person) and the *mens rea* (intending to kill the person) are both present and thus a crime was committed. The motive, to put one out of their misery and end suffering, is irrelevant to the issue of criminal responsibility, although it may become a sentencing factor or issue for public debate.

2. Knowledge

Awareness of circumstances

This *mens rea* component is usually recognized by the words, such as "knowing" or "knowingly", within the definition of a crime. For example, s. 131 of the *Criminal Code* creates the offence of perjury:

…every one commits perjury who, with intent to mislead, makes…a false statement under oath…knowing that the evidence is false.

However, the words knowing or knowingly may not be included in the definition of a crime, but knowledge of a particular fact may be essential. For example, s.270 of the *Criminal Code* creates offences for persons who assault a peace officer in the execution of their duties:

> Every one commits an offence who (a) assaults a public officer or peace officer engaged in the execution of his duty…

If an accused assaulted a person not knowing that their victim was a peace officer, they are not guilty of assaulting a peace officer because they did not have the necessary knowledge. However, the person may be found guilty of common assault.

3. Willful blindness

Choosing to remain ignorant of the truth

Willful blindness "arises where a person who has become aware of the need for some inquiry declines to make the inquiry because [they] do not wish to know the truth[10]". In possession offences such as possession of stolen property, willful blindness can be a *mens rea* substitute for actual knowledge. In *R. v. Vinokrov* 2001 ABCA 113, the Alberta Court of Appeal expressed the test for willful blindness as follows:

> A finding of willful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge.

4. Recklessness

Seeing a risk but taking the chance

Recklessness arises when a person persists in their conduct knowing that there is a risk of danger. For example, s.443 of the *Criminal Code* creates culpability for reckless damage caused by fire:

> Every person who…recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty…

It is not necessary to intend that a consequence occur nor is actual knowledge of circumstances required. If the risk of a harmful consequence is high and the accused knowingly takes that risk, the *mens rea* of recklessness is established.

CATEGORIES OF LIABILITY

All offences require the *actus reus* element to be proven by the prosecution. However, the *mens rea* is not necessary in all cases. There are three categories of liability created by statute and distinguished as follows:

- **Full Liability Offences**
  - requires proof by the prosecution of a positive state of mind (*mens rea* such as intent, knowledge or recklessness)
  - includes most criminal offences
- **Strict Liability Offences**
  - there is no necessity for the prosecution to prove *mens rea*. However, it is open to the accused to avoid liability by proving that a reasonable person would have committed the *actus reus* under the same circumstances (the defence of due diligence)
  - may be either federal or provincial offences
  - generally, these include matters dealing with health, safety, and general welfare of the public
- **Absolute Liability Offences**
  - requires *actus reus* only
  - it is not open to the accused to clear themselves by showing that they were free of fault
  - covers most provincial offences (e.g. speeding, red light infraction, etc).

Ultimately, the courts will interpret the offence and decide into which category it will fall.

[10] R. v. Sansregret (1985) 18 C.C.C. (3d) 223 (S.C.C.) per McIntyre.

COURT REJECTS IMPAIRED DRIVER's NECESSITY DEFENCE

R. v. L'Hirondelle, 2002 ABPC 175

An Alberta Provincial Court Judge rejected a driver's defence that she drove while impaired out of necessity. The accused testified that she was out drinking to celebrate a friend's birthday when he got involved in a bar fight with 3 or 4 other persons. During the scrap her intoxicated friend fell back and struck his head on the ground. The others involved fled the scene. The accused went to arouse her companion, but could not. Noticing blood oozing from the back of his head, she thought his life was in danger and panicked. She dragged him to her car and drove him to the hospital. She also told the court that she did not want to leave him alone to go and call for help. On arrival at the hospital, the accused was arrested by a special constable security guard and turned over to police. She subsequently provided two breath samples over the legal limit.

The Necessity Defence

The defence of necessity is a heavily circumscribed common law defence recognizing that in rare and compelling circumstances an accused person should be excused from a crime because it was committed as a product of a 'morally involuntary' decision. The defence will only succeed if the following three conditions are met:

1. the situation is one of imminent peril or danger. This includes both a subjective belief that such a situation exists as well as an objective basis for such a conclusion. In other words, the accused's belief must be reasonable. It would not be sufficient for the accused to only argue they perceived imminent peril or danger when it was objectively unjustified;
2. there is no reasonable legal alternative to the course of action taken; and
3. the harm inflicted is lesser than the harm avoided

Although Justice Creagh accepted the accused's subjective belief that her friend was seriously injured, there was an insufficient objective basis for believing the situation was one of imminent peril. The inability to arouse her companion could have been the effects of the injuries or alcohol consumption and the only evidence of injury was the blood. With respect to other reasonable legal alternatives, she could have run into the bar or any other business and called 911 or requested some one else to do so. Finally, the court held that despite not wanting to leave her friend alone to make a call, this would have been a lesser harm inflicted than exposing the public to an impaired driver. The accused's necessity defence was rejected and she was convicted.

Complete case available at www.albertacourts.ab.ca

AROMA OF BURNT MARIHUANA PROVIDES REASONABLE GROUNDS

R. v. Dubois, 2002 BCPC 0239

When two police bicycle members were on patrol they detected a smell of burning marihuana as a Corvette passed by them. The car turned into a parking lot and the officers rode up to it. An officer saw the driver raise a beer and take a drink. A strong odour of burning marihuana could be smelled coming from the car and a box of beer was seen in the rear of the vehicle behind the seats. The driver and his female passenger were told to exit the car. At this time the female brushed what the police suspected was marihuana leaves or remnants from her pants. Both of the occupants were advised they were under investigation for possession of a controlled substance and open liquor in a vehicle and that the vehicle would be searched. A police dog was

called to the scene, searched the car, and located a baggie of marihuana between the passenger seat and the passenger door, roaches in the ashtray, and a sum of money. The accused driver was arrested and taken to the police detachment where a jail guard found a deck of cocaine in his pants. He was subsequently released on a Promise to Appear for the drug offences and served a violation ticket for the liquor offence. During the trial *voire dire* to determine the admissibility of the drugs, the accused argued that his rights under s.9 (arbitrary detention) and s.8 (unreasonable search and seizure) of the *Charter* had been violated.

The Searches

Because the searches of both the vehicle and the accused were conducted in the absence of a warrant, they were presumptively unreasonable and the burden lay with the Crown to prove that they were nonetheless reasonable. In concluding that his rights were not breached, British Columbia Provincial Court Justice Sinclair stated:

> The Criminal Code requires that an officer must subjectively have reasonable grounds on which to base an arrest or detention. Those grounds must be justifiable from an objective point of view, that is a reasonable person placed in the position of the officer must be able to conclude that there were reasonable and probable grounds. I have concluded that a reasonable person would readily conclude that given the aroma emanating from the vehicle it was reasonable to conclude that one or both of the occupants had recently used marihuana within it and might do so again.
>
> In addition, there was apparently open liquor in the vehicle. The accused was seen to drink from a beer can. It was reasonable to conclude that the accused might continue to drink and that his ability to operate the vehicle, if not then impaired by alcohol or a drug, might become so later.
>
> Thus the police had the right and, indeed, the duty to investigate further. The situation cried out for them to search the vehicle. They had reasonable and probable grounds to believe that an offence had just been committed or was being committed. Thus they had the right and the duty to detain the accused and to conduct a search of the vehicle incidental to detaining him. They could hardly have walked away.

Furthermore, Justice Sinclair found the search of the accused at the detachment was lawful as an incident to arrest. The evidence was admissible and the accused was convicted of cocaine possession, but acquitted of the marihuana charge. Although very close, the court was not satisfied beyond a reasonable doubt that the accused had knowledge of and control over the baggie. It was possible that the female passenger had the baggie and put it between her seat and the door when she exited the car.

Complete case available at www.provincialcourt.bc.ca

REASONABLE GROUNDS INCLUDES EXPERIENCE & TRAINING

R. v. Homewood, 2002 BCPC 0298

A police officer received a tip from an electrical utility company of a possible marihuana grow operation at a residence because of high power consumption. Attending the premises but gathering no substantive evidence to support the information, the officer suspended his investigation. About a year later, the investigation was revived by another officer targeting potential grow operations in the city. A search warrant was obtained and executed at the property. Police found 12 marihuana plants and related paraphernalia and charged both occupants with six drug related offences. During the *voire dire*, the accused argued that the police lacked reasonable grounds to properly support the search warrant.

In reviewing the basis for the search warrant, British Columbia Provincial Court Justice Alexander concluded that there were sufficient grounds upon which a justice could have issued the warrant. He noted that the grounds to support the warrant were based on the following:

- a consistent pattern of high electrical consumption when compared to similar residences;
- a FLIR (forward looking infrared) examination of the exterior of the residence revealed two hot spots;
- a perimeter search revealed a smell of marihuana coming from the residence; and
- the officers belief that rental property was consistent in his experience and understanding as an earmark of a grow operation

The accused submitted that the information to obtain was problematic. They pointed to inconsistencies in the police investigation concerning the existence of a basement suite, wind direction at the time of the perimeter search, and the absence of notes or a report made by the FLIR operator. After scrutinizing the testimony of the officers, the court found that the inconsistencies were minor and did not mislead the issuing justice. In concluding that there were sufficient reasonable grounds upon which a justice of the peace could issue a warrant, Justice Alexander stated:

> I accept that there may be many explanations for alleged high hydro consumption at the residence. I also accept that it is likely that the majority of rental properties are not grow operations. Further, a FLIR examination, in the absence of a technical report from its operator, may in itself be inconclusive. A police officer is, however, entitled to rely on his training and experience in determining whether he has a sufficient basis to seek a search warrant. Part of that determination involves a consideration of all the factors collectively. That is, an evaluation of the totality of the circumstances in determining whether reasonable and probable grounds for a search warrant exist.

Since there was no breach of the accused's rights under s.8 of the *Charter* to be secure against unreasonable search or seizure, the evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

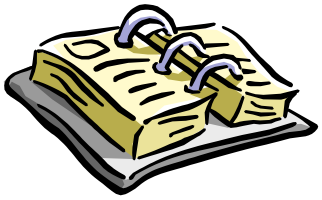
DID YOU KNOW…

that Quebec has a provincial *Charter of Human Rights and Freedoms*?

Interestingly, one of the rights places an obligation on citizens to immediately help others whose lives are in peril unless doing so puts one's self or others at risk.

s.2 *Quebec Charter of Human Rights and Freedoms*
Every human being whose life is in peril has a right to assistance. Every person must come to the aid of anyone whose life is in peril, either personally or by calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

ALL THE BEST FOR 2003



The staff at the Police Academy would like to wish our **"In-Service: 10-8"** readers and their families all the best for 2003. It has been a pleasure serving British Columbia's police officers by keeping them up-to-date on many of the issues facing them as they protect the citizens of their communities. May this new year bring you good cheer and have a safe and blessed 2003.

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